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FREE SPEECH FOR RADICALS.

FREE SPEECH
FOR
RADICALS

ENLARGED EDITION

BY

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THE FREE SPEECH LEAGUE

At Albany, New York, on April 7, 1911, the Free Speech League was incorporated. The incorporators are: President, Leonard D. Abbott, associate editor of *Current Literature;* Vice-president, Brand Whitlock, mayor of Toledo, Ohio; Lincoln Steffens, leading progressive economist; Bolton Hall, author and lawyer; Gilbert E. Roe, law-writer; Treasurer, Dr. E. B. Foote, author of medical books; Secretary, Theodore Schroeder, author and lawyer. In the articles of incorporation the purposes of the Free Speech League are declared to be:

"The principal objects for which said corporation is formed are as follows, viz: By all lawful means to promote such judicial construction of the Constitution of the United States, and of the several states, and of the statutes passed in conformity therewith, as will secure to every person the greatest liberty consistent with the equal liberty of all others, and especially to preclude the punishment of any mere psychological offense; and, to that end, by all lawful means to oppose every form of governmental censorship over any method for the expression, communication or transmission of ideas, whether by way of previous inhibition or subsequent punishment; and to promote such legislative enactments and constitutional amendments, state and national, as will secure these ends." The officers are all unsalaried. If you are interested send a contribution to

THE FREE SPEECH LEAGUE,
56 East 59th St., New York City

FOREWORD TO THIS EDITION.

In this volume the present free speech struggle is illustrated, by some incidents of our industrial war. The cases reported are illustrative fragments, not complete historical expositions. For other aspects of the present struggle for free speech the reader must consult my other writings.

This edition of "Free Speech for Radicals" has doubled its size and the added parts are the most important. All are accompanied by argumentative suggestions, interspersed to help the reader see and decide the issues involved. Here I will add a few words concerning the new chapters of this edition.

In the essay on "Methods of Constitutional Construction," I illustrate the synthetic method, by its application to the free speech clause of the Federal Constitution. So, I reach conclusions in harmony with Jefferson, but not with our courts. Of course, the judicial dogmatists never use this method, nor refer to such data and arguments as I use. It is perhaps expecting too much of mere judges that they shall possess so enlightened a mind as will incline them to achieve a relatively impersonal intellectual interest in free speech. For their political, material and emotional interest, they find it easier and more efficient to ignore such data and arguments as I present, rather than to state them fairly and then point out their errors.

In some aspects the essay on the "San Diego Free Speech Fight" is the most important addition. That conflict is characteristic of similar conflicts which have taken place in about twenty other cities. In every such situation, the relatively prosperous portion of the populace and the courts have given us the same brutal and lawless interpretation of *law and order* and of *freedom of speech* as that supplied by the respectable mob of San Diego business men and their class dominated courts and legal machinery, operating under public authority and

with public pay. The astonishing thing is not that our courts have lost the respect of the poor, but that anyone should be surprised thereat.

The most remarkable feature of the situation was and still is the general indifference toward such usual, violent and lawless suppressions of free speech. The efficiency of an effort to discredit courts and law would scarcely have been increased if the prosperous portion of the American public, the local courts and Federal officials, had all consciously conspired to make it plain that they have the uttermost contempt for *law, order* and *constitutional guarantees*, except when these serve to justify their superstitions or their sordid interests and the blindness of their aversion to the disinherited.

I repeat that similar conceptions of law and order and freedom of speech have been efficiently enforced by respectable mobs and officers of the law in about twenty other cities. In Spokane, near double the number of persons were involved and the savagery was perhaps even greater. Long afterwards the responsible chief of police was assassinated.

As all the motive for the lawlessness herein set forth is a contest over the habitual modes of exploitation, so the great European war is only an extension of that contest to the domain of international relations, and persued with the same disregard for more enlightened views of justice and freedom. There, as in San Diego, it happens that good order and free speech was the avowed issue of principal, over which the contestants debated to conceal the issues of economic greed, and injustice. This I hope is made plain in the last essay. Human motives, human methods and human savagery are quite the same whether among the privileged classes of New York and San Diego or on the battlefields where the European Monarchs, are fighting for territorial extension of the opportunity for exploitation, by their favored ones. Furthermore, they will remain the same, until our judges and other "leaders of thought" outgrow their infantile intellectual methods and earnestly strive to acquire a sympathetic understanding of the victims of our social system,

when these victims utter their cries of pain. I trust it is not wholly delusional to hope that some day even judges and "educated" citizens will personally live up to the high standard of patient endurance, of intellectual appeal, and such unquestioning confidence in these as they seem to expect of those from whom the advantages of culture and leisure have been witheld, together with justice.

The San Diego methods of upholding exploitation at the price of free speech, was practiced on little Servia by Austro-Hungary and has produced the European war. Unless we change our methods, another San Diego or a Spokane free speech fight will some day kindle the fires of an American revolution, which may bear the same relation to the French Revolution that the present European wars bears to prior European wars. Suppose you try to remain awake long enough to read about San Diego, *and then think it over*, to decide what you are going to do about the almost daily abridgement of free speech, now accomplished by lawless policemen with the approval of a lawless judiciary.

THEODORE SCHROEDER.

NEW YORK CITY.

P. S.—With the reading of the proofs for these pages there came to hand the *Final Report of the Commission on Industrial Relations*, wherein I found an interesting statement about free speech, in support of my own conclusions. I republish it as an appendix.

CONTENTS.

I

OUR VANISHING LIBERTY OF THE PRESS

Republished from *The Arena, Dec. 1906*

FOR OVER a century it has been believed that we had abolished rule by divine right, and the accompanying infallibility of officialism, and that we have maintained inviolate the liberty of conscience, of speech and of press. However, this belief of ours is fast becoming a matter of illusion. Though a love for such liberty is still verbally avowed, yet in every conflict raising an issue over it, it is denied in practice. There is not a state in the Union to-day, in which the liberty of the press is not abridged upon several legitimate subjects of debate. Here will be discussed but one of these, and that perhaps the most unpopular.

By gradual encroachments and unconscious piling of precedent upon precedent, we are rapidly approaching the stage in which we will enjoy any liberties only by permission, not as a matter of right. In this progressive denial of the freedom of conscience, speech and press, all three branches of government have transgressed, without seriously disturbing the serene, sweet, century-long slumber, into which we are lulled, by the songs of liberty, whose echoes still resound in our ears, but whose meaning we have long since forgotten.

A century ago we thought that we had settled all these problems of liberty. In all our constitutions we placed a verbal guarantee of liberty of speech and press, and then stupidly went to sleep, assuming that the Constitution had some mysterious and adequate potency for self-enforcement. This is the usual mistake, always so fatal to all liberties, and the multi-

tude is too superficial and too much engrossed with a low order of selfish pursuits to discover that constitutions need the support of a public opinion which demands that every doubtful construction shall be resolved against the state and in favor of individual liberty.

In the absence of such construction, constitutions soon become the chains which enslave, rather than the safeguards of liberty. Thus it has come that under the guise of "judicial construction," all constitutions have been judicially amended, until those who, by a dependence upon the Constitution, endeavor to defend themselves in the exercise of a proper liberty, only make themselves ridiculous. Persons finding satisfaction or profit in repudiating constitutional guarantees, and combining therewith sufficient political power to ignore them with impunity, unconsciously develop in themselves a contempt for the fundamental equalities which most founders of republics sought to maintain. This contempt is soon shared by those who find themselves the helpless victims of misplaced confidence in constitutions, and through them is transfused to the general public, until that which we should consider the sacred guarantee of our liberties becomes a joke, and those who rely upon it are looked upon as near to imbecility.

Some years ago a United States Senator (Mr. Cullom) was reported as saying that "in the United States there is no constitution but public opinion." We should also remember the unconscious humor which made Congressman Timothy Campbell famous. He was urging President Cleveland to sign a bill which had passed Congress and the latter objected because he believed the bill to be violative of the organic law. Our ingenious statesman broke in with this earnest plea: "What's the Constitution as between friends?" General Trumbull once said: "The Constitution has hardly any existence in this country except as rhetoric. . . . By virtue of its sublime promise to establish justice, we have seen in-

justice done for nearly a hundred years. It answers very well for Fourth-of-July purposes, but as a charter of liberty, it has very little force." In Idaho, at the time of the official kidnapping of Moyer and others in Colorado, the attorney of these men tried to show the court the unconstitutionality of the procedure, when the baffled rage of the judge prompted him to exclaim: "I am tired of these appeals to the Constitution. The Federal Constitution is a defective, out-of-date instrument, anyhow, and it is useless to fetch that document into court. But Constitution or no Constitution, we have got the men we went after; they are here; they are going to stay here until we have had our final say, and I would like to know what is going to be done about it?" No wonder that the wise Herbert Spencer wrote: "Paper constitutions raise smiles on the faces of those who have observed their results."

All this is true because the great mass are indifferent to the constitutionally-guaranteed liberties of others, and so allow sordid self-interest and bigotry to add one limitation after another, until all freedom will be destroyed by judicial amendments to our charters of liberty. Furthermore, to most persons, the word liberty is only an empty sound, the meaning of which they know not, because they have never learned the reasons underlying it. Thus they are too stupid to be able to differentiate between their disapproval of an opinion and their opponent's right to disagree with them. They love their own power to suppress intellectual differences more than another's liberty of expressing them, and more than the progressive clarification of human conceptions of truth, which can only come through freedom of discussion. Such persons specially owe to themselves, and to those against whom they are encouraging injustice, that they should read the defenses of liberty as made by the master-minds of the past.

That the state is a separate entity is a mere fiction of the law, which is useful within the very narrow

limit of the necessities which called it into existence. This is judicially recognized by our courts and by thoughtful laymen. By getting behind the fiction, to view the naked fact, we discover that the state has no existence except as a few fallible office-holders, theoretically representing the public sentiment, expressing its power, sometimes doing good and often thriving on the ignorance and indifference of the masses. When we abolished the infallibility of rulers by divine right, we at the same time abolished the *political duty* of believing either in God or what was theretofore supposed to be his political creation, the State.

Henceforth government was to be viewed only as a human expedient, to accomplish purely secular human ends, and subject to be transformed or abolished at the will and discretion of those by whose will and discretion it was created and is maintained. The exclusively secular ends of government were to protect each equally in life, liberty, and the pursuit of happiness. So the fathers of our country in their Declaration of Independence wrote that: "Whenever any form of government becomes destructive of these ends, it is the right of the people to alter *or abolish it.*" Similar declarations were made by the separate colonies. Thus the Pennsylvania Declaration of Rights contains these words: 'The community hath an indubitable, inalienable, and indefeasible right to reform, alter *or abolish,* government, in such manner as shall be by that community judged most conducive to the public weal." In harmony with these declarations we made laws, such that political offenders, though they had been in open revolt to a tyrannous foreign government, or had slain the minions of the tyrant, might here find a safe retreat from extradition.

All this has passed away. Formerly it was our truthful boast that we were the freest people on earth. To-day it is our silent shame that among all the tyrannical governments on the face of the earth

ours is probably the only one which makes the right of admission depend upon the abstract political opinions of the applicant. Our people denounce the unspeakable tyranny of a bloody Czar, and pass laws here to protect him in the exercise of his brutalities in Russia. Instead of being "the land of the free and the home of the brave" we exclude from our shores those who are brave and seek freedom here, and punish men for expressing unpopular opinions if they already live here. In vain do the afflicted ones appeal to a "liberty loving" populace for help in maintaining liberty.

In this short essay I can discuss specifically only the denial of liberty of conscience, speech, and press, as it affects one class of citizens, and I choose to defend the most despised.

Under our immigration laws no anarchist, that is, "no person who disbelieves in or who is opposed to all organized governments" is allowed to enter the United States, even though such person be a non-resistant Quaker. In other words, the persons who believe with the signers of the Declaration of Independence that those who create and maintain governments have a right to abolish them, and who also desire to persuade the majority of their fellow-men to exercise this privilege, are denied admission to our national domain.

Of course that and kindred legislation was the outgrowth of the most crass ignorance and hysteria, over the word "anarchist." I say most crass ignorance deliberately, because to me it is unthinkable that any sane man with an intelligent conception of what is believed by such non-resistant anarchists as Count Tolstoi, could possibly desire to exclude him from the United States. It almost seems as though most people were still so unenlightened as not to know the difference between socialism, anarchism, and regicide, and so wanting in imagination that they cannot possibly conceive of a case in which the violent resistance or resentment of tyranny might be-

come excusable. Thus it is that the vast multitude whose education is limited to a newspaper intelligence, stupidly assume that no one but an anarchist could commit a political homicide, and that every anarchist of necessity condones every such taking of human life. Nothing of course could be farther from the fact, but out of this ignorance it comes that every attempt at violence upon officials is charged against anarchists even before it is known who the perpetrator was, and without knowing or caring whether he was an anarchist, a socialist, an ordinary democrat, a man with a personal grudge, or a lunatic. From such foundation of ignorance comes the result that we punish those who disagree with the English tyrant of a couple of centuries ago, who said that the worst government imaginable was better than no government at all.

For the benefit of those whose indolence precludes them from going to a dictionary to find out what "anarchism" stands for I will take the space necessary to quote Professor Huxley on the subject. He says:

"Doubtless, it is possible to imagine a true 'Civitas Dei,' in which every man's moral faculty shall be such as leads him to control all those desires which run counter to the good of mankind, and to cherish only those which conduce to the welfare of society; and in which every man's native intellect shall be sufficiently strong and his culture sufficiently extensive to enable him to know what he ought to do and to seek after. And in that blessed state, police will be as much a superfluity as every other kind of government. . . . Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crimes; but denotes a state of society, in which the rule of each individual by himself is the only government the legitimacy of which is recognized. Anarchy, as thus far defined, is the logical outcome of the form of political theory which, for the last half-century and

more, has been known under the name of Individualism."

And men who merely believe this beautiful ideal attainable are unfit for residence in a land that boasts of freedom of conscience and press!

If the distinguished and scholarly author of the *Life of Jesus,* M. Ernest Renan, should be Commissioner of Immigration, he would, under present laws, be compelled to exclude from the United States the founder of Christianity, should He seek admission.

In his *Life of Jesus,* Renan expresses this conclusion: "In one view Jesus was an anarchist for he had no notion of civil government, which seemed to him an abuse, pure and simple. . . . Every magistrate seemed to him an abuse, pure and simple. . . . seemed to him a natural enemy of the people of God. . . . His aim is to annihilate wealth and power, not to grasp them."

If the Rev. Heber Newton were Commissioner of Immigration, he, too, would have to exclude Jesus from our land as an anarchist. Dr. Newton says: "Anarchism is in reality the ideal of political and social science, and also the ideal of religion. It is the ideal to which Jesus Christ looked forward. Christ founded no church, established no state, gave practically no laws, organized no government and set up no external authority, but he did seek to write on the hearts of men God's law and make them self-legislating."

Surely people who only ask the liberty of trying to persuade their fellow-men to abolish government, through passive resistance, cannot possibly be a menace to any institution worth maintaining, yet such men we deny admission into the United States. If they chance to be Russians, we send them back, perhaps to end their days as Siberian exiles, and all because they have expressed a mere abstract "disbelief in government," though accompanied only by a desire for passive resistance.

Julian Hawthorne wrote this: "Did you ever no-

tice that all the interesting people you meet are Anarchists?" According to his judgment, "all the interesting people" would, under present laws, be excluded from the United States. An industrious commissioner, zealous to enforce the law to the very letter, could easily take the writings of the world's best and greatest men, and if foreigners, on their own admissions, could exclude them because they had advocated the anarchist ideal of a "disbelief in government." Among such might be named the following: Count Leo Tolstoi, Prince Peter Kropotkin, Michel Montaigne, Thomas Paine, Henry Thoreau, Lord Macaulay, William Lloyd Garrison, Hall Caine, Turgot, Simeon of Durham Bishop of St. Andrews, Max Stirner, Elisée Reclus, Frederick Nietzsche, Thomas Carlyle, Horace Traubel, Walt. Whitman, Elbert Hubbard, Samuel M. Jones, Henrik Ibsen, Joseph Proudhon, Michael Bakunin, Charles O'Conor, and probably also Ralph Waldo Emerson, Thomas Jefferson, Herbert Spencer, John Stuart Mill, and—but what's the use? They can't all be named.

These are the type of men who hold an ideal, only a dream perhaps, of liberty without the invasion even of government, and therefore we make a law to exclude them from the United States. But that is not all we do in this "free" country. If a resident of this "land of the free" should "connive or conspire" to induce any of these non-resistants, who "disbelieve in governments," to come to the United States, by sending one of them a printed or written, private or public, invitation to visit here, such "conspirer" would be liable to a fine of five thousand dollars, or three years' imprisonment, or both. And yet we boast of our freedom of conscience, of speech and of press!

It is hard for me to believe that there is any sane adult, worthy to be an American, who knows something of our own revolutionary history, who does not believe revolution by force to be morally justifiable under some circumstances, as perhaps in Russia, and

who would not defend the revolutionists in the slaughter of the official tyrants of Russia, if no other means for the abolition of their tyranny were available, or who would not be a revolutionist if compelled to live in Russia and denied the right to even agitate for peaceable reform. And yet "free" America, by a congressional enactment, denies admission to the United States of any Russian patriot who agrees with us in this opinion, even though he has no sympathy whatever with anarchist ideals. It is enough that he justifies (even though in open battle for freedom) the "unlawful" killing of any tyrant "officer" of "any civilized nation having an organized government." Here, then, is the final legislative announcement that no tyranny, however heartless or bloody, "of any civilized nation having an organized government" can possibly justify violent resistance. It was a violation of this law to admit Maxim Gorky into this country, though he is not an anarchist.

In the state of New York, although satisfied with American conditions and officials, and although you believe in democratic government, if you should orally, or in print, advocate the cause of forcible revolution against Russia, or against "any civilized nation having an organized government," you would be liable, under a state statute, to a fine of $5,000 and ten years' imprisonment besides. Have we, then, freedom of conscience, speech and press. Do we love liberty or know its meaning?

Yes, it may be that a dispassionate and enlightened judge must declare such laws unconstitutional, but such judges are as scarce as the seekers after martyrdom who are willing to make a test case. Hence we all submit to this tyranny. Furthermore, the same hysteria which could make legislators believe they had the power to pass such a law, in all probability would also induce courts to confirm such power. A Western jurist, a member of the highest court of his state, once said to me that it must be a very stupid lawyer who could not write a plausible

opinion on either side of any case that ever came to an appellate court. Given the mental predisposition induced by popular panic, together with intense emotions, and it is easy, very easy, to formulate verbal "interpretations" by which the constitutional guarantees are explained away, or exceptions interpolated,—a common process for the judicial amendment of laws and constitutions.

If, then, we truly believe in the liberty of conscience, speech and press, we must place ourselves again squarely upon the declaration of rights made by our forefathers, and defend the right of others to disagree with us, even about the beneficence of government.

As when your neighbor's house is on fire your own is in danger, so the protection of your liberty should begin when it is menaced by a precedent which attacks your opponent's equality of opportunity to express his disagreement with you. Let us then unite for the repeal of these iniquitous laws, born of hysteria and popular panic, and maintained in thoughtless disregard of others' intellectual freedom.

II

THE LAWLESS SUPPRESSION OF FREE SPEECH IN NEW YORK

Republished from *The Arena, June, 1908*

EVEN the average "intelligent" American citizen can see why a reign of terror exists in Russia. We all understand that as between the nobility and peasants there exists a difference of opinion, as to the justice of their system of land-holding, taxation, and economics generally, as these are established by "law," so-called. The peasants desire to discuss their grievances and the remedies therefore. Their utterances are suppressed by a brutal and arbitrary censorship. No orderly method of securing redress being open to them, in desperation they resort to violence, in personal revenge for the wrongs they believe themselves to suffer. Every increase in official repression of free speech results in, and justifies, a corresponding increase in terrorism. We generally see this to be true, *in Russia,* and seeing it we quite instinctively understand that if peace and order were really desired by the ruling class the remedy is to withhold repression, give every one a chance to air his grievance, then reëxamine the established system and honestly try to discover and remove the legalized injustices, if any are found to exist. The man who has advocated violence feels relieved, and is less impelled to commit it, than the fellow who broods over this suppression of his speech about the injustice which he thinks he suffers. In other words, the remedy for terrorism, *in Russia,* lies in removing the justification and necessity for it; that is, in establishing entire freedom of speech

and of the press, and after opportunity of hearing all complaints, no matter how irrational, satisfy the public sense of fair play, by honestly trying to establish a more just *régime.*

But the average "intelligent" American seems unable to see that human nature is quite the same in America as it is in Russia, and that allowing our police and post-office authorities lawlessly to suppress the freedom of speech and of the press, we are thoughtlessly giving the greatest possible provocation toward the establishment of a reign of terror in America. If the present official lawlessness shall continue at the present rate, to increase its arbitrary and brutal abolition of the freedom of speech and of the press, in less than twenty-five years the United States of America will present a reign of terror infinitely worse than that which now obtains in Russia. It will be infinitely worse because our population is more intelligent and less scattered, which conditions will facilitate the activities of terrorists. Already in many, if not most, states we have frequent personal violence, often against public officials, which violence was prompted by a conviction that justice is deaf and blind, even when appealed to, and in many cases the opportunity to make that appeal has been lawlessly denied.

Fellow-citizens, if that reign of terror comes, the responsibility for it rests with you, if you have not done all in your power to maintain inviolate, even as against the police force, the fullest freedom of speech and of the press even for the most obnoxious opinions of our most despised neighbors. Here, as in Russia, the preventive of a reign of terror is more liberty and more justice—the most forceful provocative of terrorism and personal revenge is the forcible maintenance of legalized injustice, or what is claimed to be such, while at the same time suppressing complaints, as we are now doing by the lawless, or even legalized, violence of a rowdy police organization, one of whose captains

recently boasted that his club was bigger than the Constitution. If we except religion, England probably has the greatest freedom of speech of any country in the world, and it is almost the only one in which there have been no plots to assassinate its rulers. In Russia we have the most active censorship over political opinion, and the greatest number of assassinated officers. Which shall we imitate? The present tendency is to follow the example of Russia, and I desire to make a record of a very few of the facts which lead me to that conclusion.

Miss Goldman's first arrest occurred in December, 1894, for a speech made to a gathering of workingmen. She was convicted of inciting a riot, though no riot occurred, and was sent to jail for six months. According to the publications of the time I conclude that the offensive portion of her speech consisted only in this: She quoted from an article by Cardinal Manning, published in the *Fortnightly Review,* wherein he said: "Necessity knows no law, and a starving man has a natural right to his neighbor's bread." She supplemented this with her own words as follows: "Ask for work; if they do not give you work, ask for bread; if they do not give you work or bread, then take bread." I doubt if any sane man really believes that another's law-created property-right in bread is more sacred than is his own natural right to live. Does any one believe that the duty to suicide by starvation, in the presence of a stealable plenty to be stronger than the duty of self-preservation by theft when that is the only alternative? I believe Cardinal Manning and Miss Goldman told self-evident truths, which were no injury to any one because none acted upon her suggestion, and yet, she went to jail six months therefor, which I deem an outrage.

This is the only time Miss Goldman was ever convicted of any offense, even against unconstitutional laws invading the freedom of speech. However, I am told by a friend of hers that she has since been

arrested nearly forty times and detained from one hour to several days, or for several months at a time has been under bail. Many of these arrests did not even eventuate in a judicial hearing. Never has she been charged by any one with having used violence upon any one, or interfered with the property of another, nor has there ever been one scintilla of evidence that violence was ever committed upon her advice, nor has any one so far as I can learn, ever offered any evidence of any more violent speech than the one quoted. And yet see the reputation which conscienceless officials and newspapers have given her. On some arrests a preliminary hearing was had and resulted in a discharge because her utterances were not even a violation of the unconstitutional anti-anarchist laws of New York. Some of these arrests were for speeches actually made, more of them were for merely threatening to make a speech, and sometimes when neither of these facts existed she was arrested simply because she was Emma Goldman and had an undeserved newspaper reputation. As to the last I must give one detailed illustration as the same has been reported to me. Miss Goldman was accompanying a friend to a railroad station. The friend carried a suit-case. A detective saw her and in his disordered imagination she could not possibly be with another person having a suit-case unless there was a conspiracy to murder some one. Furthermore, such persons could not have a suit-case in their possession except for the purpose of carrying bombs. So the "bold" detective, without a warrant and no doubt feeling that his life would be ended if the suit-case were ever dropped, arrested the pair. At the police-station, without a search warrant, which could only be issued upon evidence of probable cause, the suit-case was examined, and the imaginary bombs had disappeared. The pair were discharged, a train was missed and a day's delay occasioned, but the government had been saved, by an inexcusable arrest, the newspapers had head-

lines and no doubt thousands of fool people thought a President's life had been saved. Besides this, Emma Goldman's undeserved reputation had received an addition which in the public hysteria would justify any number of future lawless invasions of her liberty, whenever detectives wish to divert the public attention from impending investigations of police graft.

But I must return to the lawless suppression of free speech which has come about through the silly but popular panic whenever Emma Goldman's name is mentioned, which panic cannot be explained by any overt act of hers, but the whole of which has been manufactured by the falsehoods based upon the hysterical fears and morbid imagination of ignorant officials, and spread by conscienceless sensation-hunters on the "yellow" press. At a public meeting I once heard Miss Goldman criticized because, by her mildness she had disappointed her critic. In closing the discussion, with a smile she retorted: "A man stupid enough to believe all that he sees in print about me will always remain disappointed, because it is impossible for me to live up to my reputation."

This much was necessary to explain how unwarranted is the sentiment which upholds this lawless suppression of Emma Goldman's speech. But this police lawlessness is not limited to her. For the evening of December 14, 1906, I was invited to address the Liberal Art Society, which is not an anarchist organization. Because of the many lawless interferences with the freedom of speech of anarchists, I chose to defend their right to be heard and to question the constitutionality of the anti-anarchist laws of New York. The manager of the lecture course informed me, a few days before the appointed time, that the captain of police in his precinct had threatened him with arrest should he permit me to deliver such a lecture as I had proposed, or allow any one to discuss any phase of anarchism. The manager thereupon changed my subject.

For January 24, 1907, a mass meeting was called in Everett Hall, New York City, to discuss the inexpediency and unconstitutionality of the "criminal anarchy" statute of New York. Mr. Bolton Hall, myself and two anarchists were advertised to speak. The police went to the lessor of the hall, so he said, lawlessly threatened him with arrest and a revocation of his license to conduct a hall for public gatherings, if he should allow us to execute our intention to speak for the repeal and judicial annulment of the anti-anarchist statue. The hall-owner became frightened. He could not afford to antagonize the police, so he refunded the rent and besides that paid the expenses of advertising, etc., but refused to allow the meeting to be held. So it has come to this that a lawless and arbitrary police commissioner in New York City, without even the justification of an unconstitutional statute, prohibits citizens, who are not anarchists, from making an address in a hall rented for that purpose, in which address it was simply proposed to argue that a recent statute should be repealed, or judicially declared to be unconstitutional. Thus the American slaves and cowards sit quietly by while citizens are deprived of even the right to discuss the meaning of our constitutional guarantee of freedom of speech, and while they are denied an opportunity to hear complaints about existing official lawlessness.

On December 26, 1906, I sent the following letter to the head of the police department. It has not yet been answered, except by a repetition of the lawlessness therein complained of, and this without protest from a populace, more reconciled than "ignorant" Russian peasants to be governed by the lawless use of a policeman's club. The letter is worthy of publication at this time, because of its recitals, and because the recent bomb incident in Union Square is a fulfilment of its prophecy.

"December 26, 1906.

"General Theodore A. Bingham,

"Commissioner of Police, New York City:

"*My dear General Bingham—*

"I have your esteemed favor of December 12, 1906, and note that you say, 'There is no intention in this department to interfere, except when laws and ordinances are violated.' I do not doubt that this is your personal intention, but it has not heretofore been acted upon by your subordinates. I call your attention to specific cases. The Manhattan Liberal Club meets at 220 East Fifteenth Street. The club as such has nothing to do with anarchism. It conducts a lecture platform with opportunity for free discussion of the lecture topics. Owing to this chance for propaganda, anarchists often attend to avail themselves of the privilege to discuss their pet hobby.

"At the door liberal and radical literature is sold, and among other matter *Mother Earth,* a magazine published by Emma Goldman. I am informed that your policemen have threatened the managers of the club, who are not anarchists, with arrest and a dispersal of their meeting if they allowed *Mother Earth* to be kept on sale there. This threat, I am told, was made specific as to all future numbers of the magazine, the prospective contents of which no policeman could know, and which, of course, cannot in advance be determined to be a violation of any law. I am unable to find any statute or ordinance which authorized your department thus to suppress a club not composed of anarchists, for having in its hall literature that in itself violates no law. *It is precisely such police lawlessness as this which breeds anarchists of the violent type.* Had you not better inquire a bit about this lawless interference with the rights of citizens by your subordinates, and thus make your expressed intention operative in the department?

"A second case of police lawlessness of a similar

sort arose out of the following facts. After the Haymarket killing of police in Chicago a number of anarchists were given life sentences on conviction of complicity. Later they were pardoned by the Governor of Illinois. In the lengthy pardoning message he made an exhaustive analysis of the evidence and reached the conclusion that all these convicts were innocent of the crime charged. His conclusion was not based upon a difference of opinion with the jury or trial court as to the preponderance of the evidence, but by a careful analysis showing that there was in fact not a particle of evidence directly connecting them with the offense.

"Under these circumstances the anarchists—not without reason, be it observed— infer that the conviction was the result of popular panic over anarchism, and that those who the governor said were convicted without evidence, served several years' imprisonment as 'martyrs for entertaining unpopular opinions.' I submit that it is their right to so regard them, and publicly to express the convictions of the Governor of Illinois.

"I am informed that for many years it has been the custom of anarchists and some other organizations, here and elsewhere, to hold some sort of memorial meeting in commemoration of this alleged martyrdom. Never until this year, under your administration, have these meetings been interfered with in New York City.

"This year I am informed that a line of policemen barred the entrance to the hall where it was proposed to hold this meeting. The reason assigned was simply that no meeting of anarchists would be permitted, even for a lawful purpose. Of course, no policeman possesses the occult power of reading in advance the minds of those who were expected to deliver addresses. Without such power of mind-reading no policeman could know in advance that any forbidden utterance would be indulged in. If your subordinates may thus with impunity and law-

lessly prevent assemblages of anarchists on suspicion, as to future events, they have the same right on like suspicion to close churches.

"On two recent occasions the Brooklyn police likewise assumed to do some mind-reading and excluded persons from a hall where they came to hear a lecture. I can find nothing which makes it unlawful for any particular persons to hold meetings for purposes in themselves lawful. It seems to me that it is up to you either to find such a law, or to withdraw your statement that there is no intention to interfere except under the law, or to discipline your officious, lawless subordinates.

"I can find no power in the statutes authorizing any such performance. If my information as above set forth is correct, then I do not hesitate to say that the conduct of your subordinates was as much a matter of lawlessness as the killing of Chicago policemen which is charged to anarchists.

"I submit to you, my dear sir, that your love of fair play and your desire to preserve order should induce you to make some inquiry within your department, to the end *that your men may not by their own lawless conduct provoke to violence those who may rightfully feel themselves thus wrongfully oppressed, but who are naturally peacefully disposed.*

"I assure you I write only in the interest of that freedom of speech and press which I believe to be guaranteed by our Constitution, which it is your business as police commissioner, and my business as a member of the bar, and as attorney for the Free Speech League, to uphold.

"Hoping that in my desire to be of service to you I have not allowed myself unduly to trespass upon your time by an over-long document, I remain,

"Most cordially yours,

"Theodore Schroeder."

Just a few words as to the sequel in Union Square, March twenty-eighth, which is a fulfilment of my prophecy to General Bingham, that suppres-

sion of free speech conduces to violence. Briefly the facts are these. A permit had been secured for a meeting of the unemployed to be held in Union Square, and it was advertised. Later the permit was withdrawn, not for public reasons that would operate against all meetings at that time and place, but because of the Park Commissioner's objections to this particular meeting which was to be addressed by socialists. The crowd gathered, were denied opportunity to hear speeches and clubbed out of the park—"the nightsticks swung with deadly precision." The bomb was thrown, and the man said to have thrown it, according to the New York *Times*, March 29, 1908, gave these as his reasons: "Yes, I made the bomb and I came to the park to kill the police with it. The police are no good. *They drove us out of the park, and I hate them.*"

Thus it happens that the unjust denial of equal opportunity for freedom of speech, was the immediate provocation for the bomb-throwing. And so strangely do dull minds work that the Park Commissioner whose revocation of the permit evidently provoked to murderous assault actually deems the killing which was provoked by his act a justification for it. Friends, in America as in Russia, the preventive of terrorism is to be found in greater freedom of speech, and more earnest and honest effort to discover and remove legalized injustice. By freedom of speech I do not mean the right to agree with the majority, but the right to say with impunity anything and everything which any one chooses to say, and to speak it with impunity so long as no actual material injury results to any one, and when it results then to punish only for the contribution to that material injury and not for the mere speech as such.

The thought that the greatest liberty of speech, even as to "violent" language, is the best way to avert actual violence is not original with me. It is as old as the controversy for intellectual freedom.

For those whose tyrannical dispositions will not allow them to acknowledge freedom of utterance as a right, I quote a few paragraphs which may persuade them to allow others, as a privilege of expediency, those rights which once were thought to be guaranteed to all Americans by our constitutions, but which our courts and a brutal police-force have destroyed in spite of our constitutions.

"Philip II. of Spain said that a king was never more secure from the malice of his people than when their discontents were suffered to evaporate in complaint. (1 Wraxall's Fr. 96.) Socrates said the sun could as easily be spared from the universe as free speech from the liberal institutions of society. (*Apud Hob. Eth.* XIII.) * * *

"Quetelet (*'sur l'homme'* 289) said that the press tends to deprive revolutions of their violence by hastening the reaction. * * *

"One great advantage of a free press is, that it tends to disperse the dangers that culminate in sedition. Bacon said that the surest way to prevent sedition, if the times do bear it, is to take away the matter [cause] of them. (41 Parl. Deb. 1591.) A great writer has also observed that 'Violence exerted towards opinions which falls short of extermination, serves no other purpose then to render them more known, and ultimately to increase the zeal and number of its abettors.' "—*Liberty of the Press, Speech and Public Worship,* by Patterson, pp. 4-41-79.

Robert Hall, who over a century ago wrote in defense of liberty, among many good things, said this:

"When public discontents are allowed to vent themselves in reasoning and discourse, they subside into a calm; but their confinement in the bosom is apt to give them a fierce and deadly tincture. The reason of this is obvious. As men are seldom disposed to complain till they at least imagine themselves injured, so there is no injury which they will

remember so long, or resent so deeply, as that of being threatened into silence. This seems like adding triumph to oppression, and insult to injury. The apparent tranquillity which may ensue, is delusive and ominous; it is that awful stillness which nature feels, while she is awaiting the discharge of the gathered tempest. * * *

"If the government wishes to become more vigorous, let it first become more pure, lest an addition to its strength should only increase its capacity for mischief."—*An Apology for the Freedom of the Press and for General Liberty,* pp. 21-22.

"When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."—*Speeches of the Hon. Thomas Erskine,* Vol. II, p. 141, edition of 1810.

P. S. This essay was written and published before the Hon. Wm. J. Gaynor became the Mayor of New York City. Since then he has seen to it that the grosser abuses as herein complained of have been discontinued.

III

ON SUPPRESSING THE ADVOCACY OF CRIME

(From the stenographic report of a lecture.)

THE ever growing complexity of our social organism, with its creation of new relations and new conditions of human existence, constantly requires the re-interpretation and unprecedented application of our constitutionally guaranteed liberty. In making these new interpretations and applications, the judicial, as well as the popular mind, is prone to read into the Constitution its own prejudices, superstitions, or personal and class interests. It is the purpose of this discussion to discover the essential and fundamental, rather than the superficial, elements of these problems as they relate to our guarantee for liberty of speech and press.

Under the pressure of misconceptions, arising wholly from the superficial aspects of the problem, it has come to pass that in almost every controversy arising from an exercise of the liberty of speech and press, the official action has been in favor of its abridgment. The total absence of any serious protest against these denials demonstrates how the thoughtless public is incapable of seeing that the liberties of speech and press are the foundations of all other liberty; and, that by permitting them to be frittered away, all other liberty is being endangered.

In our military possession of the Philippine Islands we find executive authorities arresting an American editor for republishing our own Declaration of Independence. The excuse offered was that the Declaration of Independence would tend to in-

cite Filipinos to insurrection; since, not illogically, they might conclude that we ourselves, in our government of them, were repudiating our own declaration about liberty and denying a fundamental liberty of theirs.

In Porto Rico we find an American editor subjected to seventy or more arrests, and, finally, in practical effect, banished from the island as the one condition under which he could escape what might prove life imprisonment. His offense consisted only in publishing what he believed to be true concerning some carpet-bag officials, appointed by the President. We have heretofore been led to believe that one might tell the truth from good motives; but, in the case of this editor, the court denied him an opportunity of proving his allegations to be true. These officials, though acting under the Constitution of the United States, assumed to set aside the provision guaranteeing freedom of speech and press, on the pretext that, to discredit American officials would promote insurrection among native Porto Ricans. The authorities in Washington were not sufficiently imbued with any love for liberty to even induce a reprimand of the petty officials, who had undertaken thus to amend the Federal Constitution.

Another vicious infringement of liberty has grown out of the development of our government by injunction. In labor difficulties, very frequently, we find courts issuing injunctions against strikers, which, under the pain of imprisonment, prohibit them from talking with the strike breakers, or even from walking upon the streets adjacent to their former places of employment. Here again the infringement of freedom of speech, by judicial injunction, would probably be justified, by those who can justify it, with the statement that such conversation might lead to a conspiracy in the restraint of trade, should the new employee decide to join the strikers. In passing it is worthy of note that no injunction is

ever issued against employers to restrain them from conversation with one another, because it might lead to agreements in restraint of competition as employers.

In Idaho a few years since many striking miners were herded in outrageously unsanitary "bull-pens" by the militia of the State. An editor, who foolishly believed the Constitution of Idaho to be of some importance, propounded some questions in his paper, calculated to bring out that this conduct of the militia was unauthorized by law and in violation of law. For asking these questions, as to the source of the authority for the military conduct, he was also arrested and placed in a "bull-pen" with the others. Here, again, a petty official, deriving his sole authority under the Constitution, assumed to set it aside, primarily because another in the exercise of his freedom of the press, guaranteed by the Idaho Constitution, was personally offensive to this official. Perhaps those intelligent enough to frame a defense for such conduct would justify the abridgment of freedom by saying that such publication would tend to encourage resistance to the authority of the militia. It never seems to occur to those in power that others may properly inquire into the sufficiency of their authority and rightfully resist, even to the taking of life, if necessary, the exercise of power by persons holding office, when no adequate authority for its exercise can be found in the laws and Constitution.

Similarly we find in Colorado, at the time of the recent labor disturbances, that a Socialist editor was promptly arrested for exercising his right of freedom of press in criticism of local military authorities. Still insisting that he had the constitutional right to express whatever opinion he saw fit, about the conduct of military officials, the celebrated general, in charge of the official outrages, considered that he had sufficiently denied the right of the editor by saying, "to hell with the Constitution."

Another most clear instance of a denial of freedom of speech and press is in the laws which have for their avowed object the suppression of obscene literature. We are now suppressing serious scientific discussions of the physiology, hygiene, ethics and psychology of sex, as well as some sane advocacy of unpopular opinions about the sociologic problems arising from sex. This is done, because in the unhealthy minds of some persons the epithet "obscene" can be applied to such books. The pretense is made that such books promote sexual immorality, and they are suppressed sometimes where that dreaded immorality is not even a statutory offense, and where the sole purpose of the suppressed print is to inquire if some conduct, lauded as moral, is not in fact immoral.

Another, and in some respects the most dangerous invasion of liberty of press, has developed out of a constructive contempt of court. With the abolition of government by divine right, we came to believe that we might with propriety criticise the official conduct of every public servant. However, since in contempt proceedings, as a rule, judges are lawmakers, judge and juror combined, our judiciary has very often considered itself as still far too sacred for criticism. Recently in Colorado, Ohio and New York, editors have been punished for contempt of court, which consisted of criticism published in their newspapers, and not in the presence of the court; and therefore having no direct tendency to disturb its orderly proceeding. In Colorado, perhaps in the other States also, proof of the truth was excluded. Judges, who under such circumstances punish their critics for contempt, simply because the criticism is not of such lady-like character as to be pleasing to the æsthetic judicial sense, are committing a most extraordinary outrage on the freedom of the press. With but very slight extension this constructive contempt of court will, in the very near future, develop into the régime of an infallible tribunal, disposing

of the property and liberty of citizens, and at the same time expunging the right of an adequate appeal to a public conscience for the reversal of iniquitous rules of injustice, by appropriate legislation, or election-day protest. Once establish such an infallible judiciary, and the precedent will soon warrant a re-establishment also of the infallibility of legislators, and executives.

Another most extraordinary clamor has come against the discussion of the negro problem in the North. In Philadelphia a play was suppressed, which was obnoxious to the negro population. In Brooklyn a similar clamor for its suppression was unsuccessful. In Chicago loud protests were heard against an address by Senator Tillman. However, there the authorities fortunately still deemed it more important to suppress disorder which might possibly result from discussion than to suppress freedom of speech itself. Last winter in New York City there was a public debate held in a church, as to whether or not Socialist propaganda should be suppressed by law. These are other straws showing the tendency of our time.

Already one per cent of the population of the United States hold 99 per cent of all its property. It is estimated, if the present rate of concentration of wealth shall continue, that within a century one hundred families will own 99 per cent of all the property. With the power on the part of the owners of such concentrated wealth to befuddle the mind of the public, through ownership of practically all popular periodical publications, and by their ability to purchase the election and the votes of those in power and to insure a "sane and safe" judiciary to explain away our constitutionally guaranteed liberties, the time may not be far distant when we shall have the legislative suppression of any adverse criticism upon political and economic theories, which are not advantageous to the rich few.

After the assassination of President McKinley

a newspaper reporter attempted to get an interview with a United States Senator, who had had some personal differences with the President. The Senator declined to be interviewed saying that because of his past personal differences he would have nothing to say. For exercising his freedom of speech by simply announcing that he had nothing to say, a large number of United States Senators, I think it was a majority, sent telegrams to a Southern paper, declaring their willingness to vote for his expulsion from the United States Senate. Here there was not even the excuse that the Senator's offending silence promoted crime, and it is a most glaring illustration of the instability of freedom, even with the most dignified, and, presumably, the most enlightened body of men that can be gathered in the United States. It is sad to contemplate how slender is the thread whose severance terminates our liberties.

Under the influence of that same unreason and epidemic of hysteria, ingeniously developed to the highest pitch of excitement by our conscienceless press, came into existence that multiplicity of state and national laws, directed against the mere abstract opinions entertained by people calling themselves Anarchists. All this came in spite of the fact that there was no evidence whatever that Czolgosz was an Anarchist. However, the word Anarchist was an effective epithet, and, hereafter all those to whom it could be even metaphorically applied must be denied their freedom of speech and of press, no matter how harmless or justifiable might be their political creed.

Under our present anti-anarchist laws, this government has established itself as an international police-force for the protection of all tyrants. Under our Federal statutes a foreigner who teaches "the propriety of unlawfully assaulting or killing any officer" in the "organized government" of a cannibal chief, or of a human butcher acting under auth-

ority of an arbitrary brute, crowned as a Tzar, though such immigrant is not an anarchist, and desires only to establish a more humane rule, such a foreigner is denied admission to the United States as unfit to touch our sacred soil, and is deported to take such punishment as may be meted out to him by those from whom he was fleeing.

Within a few days it was reported that Russian officials are demanding that a refugee, who escaped from Siberia, shall be deported from these United States because he is advocating the cause of, and raising money for, the Russian revolution. If the law is impartially enforced his deportation will follow.

Under the laws of New York State one may be guilty of advocating "criminal anarchism" without advocating anarchism or being an anarchist in fact. This of course is a fair sample of legislative intelligence. A Social Democrat from Germany, who in New York merely advocates the establishing of a German republic without the permission of Kaiser Billy, the war lord; or the Irish nationalist who in New York verbally asserts the propriety of overthrowing the organized government of England within Ireland's domain; the Russian or American patriot who would advocate the overthrow of the Tzar's absolutism, and his Cossack's official brutality, "by any unlawful means," though no lawful ones are provided; or whoever is voluntarily present at such discussion, is liable to five years' imprisonment and a fine of $5,000 besides. The owner, agent, superintendent or janitor of a building who permits it to be used for any of the above discussions is liable to a fine of $2,000 and two years' imprisonment. Furthermore, every editor and publisher of such articles as are above described, and innumerable such as have been published in our great dailies with impunity, is by this law presumed guilty of "criminal anarchy" until he proves himself innocent.

The metropolitan journals have nearly all violated this law, and no one protests. If relying upon these precedents, some unpopular victim of general prejudice, who is too poor to adequately defend his liberty, prints such matter, at once the luckless devil is pounced upon with a great flourish of righteous authority, and the use of unpopular and question-begging epithets, is sufficient to insure an unquesting public approval.

The unfortunate one goes to his prison cell, perhaps for advocating something most people believe in, or something the mob does not even understand, and then it thanks God that a "criminal Anarchist" has been made safe.

In all these cases, if we may take the justification for the abridgment of the liberty of speech to be made in good faith, the question involved is this: May a citizen advocate that which others esteem to be of immoral or criminal tendency? Since an affirmative answer to the latter implies an affirmative answer to the former, the problem in its broadest sense may be thus stated: Has any one the constitutional right to advocate the moral righteousness of conduct which the law has declared criminal?

But clarity of vision requires that we differentiate between two possible conditions. If such advocacy of crime has resulted in the commission of the crime advocated, then the promoter becomes liable as a principal, or as an accessory before the fact. In that case penalties are meted out to him for his participation in the subsequent crime, not for its mere fruitless advocacy.

That case must be carefully distinguished from the one in which the advocacy of crime is without any directly resultant criminal act. Here I am concerned only with the latter. The problem then is: Can a man, under our Constitution guaranteeing liberty of speech and press, be properly punished for his fruitless advocacy of crime? It seems to me that if we are to reason upon the matter only in general

terms, that then Professor Cooper in the following language has given us an unanswerable argument for an affirmative answer to our question.

"Indeed, no opinion or doctrine, of whatever nature it be, or whatever be its tendency, ought to be suppressed. For it is either manifestly true or it is manifestly false, or its truth or falsehood is dubious. Its tendency is manifestly good, or manifestly bad, or it is dubious and concealed. There are no other assignable conditions, no other functions of the problem.

"In the case of its being manifestly true and of good tendency there can be no dispute. Nor in the case of its being manifestly otherwise; for by the terms it can mislead nobody. If its truth or its tendency be dubious, it is clear that nothing can bring the good to light, or expose the evil, but full and free discussion. Until this takes place, a plausible fallacy may do harm; but discussion is sure to elicit the truth and fix public opinion on a proper basis; and nothing else can do it."

However, the importance of the problem deserves more specific consideration and discussion. Let us begin by assuming that one may be properly punished for even the fruitless advocacy of that which tends to crime, and see where such a conclusion leads us to. I have written several arguments against the inexpediency of suppressing "obscenity." The net results of those arguments in opposition to the suppression of obscene literature is that, on the whole, it is more beneficial to tolerate all obscenity in books than to allow, as we now do, the suppression of all thorough or searching discussion of sex problems. In other words, I am justifying, on the whole, the moral righteousness of so-called obscene literature. Necessarily, my argument for the legislative and judicial annulment of those laws might encourage some one to violate them.

If under our constitutions we are not protected in the right to advocate the moral righteousness of

that which the statute denounces as crime, it would seem to follow that in such a case as the one I have just stated, the Legislature may properly prohibit us from adequately arguing for the repeal or amendment of our present criminal code. This is an intolerable proposition. On the other hand, if the Legislature cannot prohibit such arguments, then it follows that the constitution does protect the citizens in advocating the moral righteousness or anything which the law denounces as criminal.

If the contrary doctrine could be established, it would only be necessary to make some line of conduct criminal, as a preliminary justification for prohibiting all discussion of the subject. And it must be apparent, if we admit that we have no right to advocate the moral propriety of conduct which the statute denounces as crime, that then we are admitting that there is practically no invasion of the liberty of speech which can not be legally accomplished. Already it is crime to smuggle dutiable goods into this country in violation of our tariff laws. To denounce a protective tariff as immoral and a robbery of the masses for the benefit of the protected monopolists is a legitimate argument for its abolition. However, such argument necessarily tends to encourage some toward the crime of evading the tariff. If then we have not the right to advocate the moral righteousness of that which the law denounces as a crime it would seem that Congress has the power to make a protective tariff the creed of a divinely established economic institution, which must be and thus can be maintained as a thing above criticism It follows, therefore, that no line can be drawn between the unlimited freedom of speech and press (holding the speaker and publisher responsible for the direct but actual consequences of their utterances), and that condition where we will have no freedom of speech and press as a matter of right, but only as a matter of legislative or judicial permission.

We may next inquire as to what must have been the intention of the framers of our constitution with reference to this problem. We can best gather that intention if we make inquiry as to the character of the abridgments of freedom of speech and press which had theretofore existed and against which they sought to protect themselves and others in the future. We recall that prior to the Revolution there was a union of church and state. Religious observances were enforced by the criminal law. Blasphemy, which was one of the number of excuses for invading the liberty of speech, consisted of language calculated to discredit the established religion, and tending to induce others to commit religious crimes, such as avoiding church attendance, and denying the correctness of what was there thought. In other words, our forefathers had been punished for advocating the verity and morality of that which was immoral and criminal under the existing law, and desired to make it impossible for others thereafter to be punished for the like advocacy of that which was of criminal tendency.

Another of the abridgments of the liberty of speech and press was the prohibition against seditious libel—of utterances which tended toward insurrection, rebellion and the general overthrow of the government. All of the participants in the American Revolution and all those who helped to bring it about, had no doubt been guilty of seditious speech and seditious libel; and apparently for the very purpose of protecting future generations in the right to advocate sedition and revolution, did they put in the Constitution a guarantee for the freedom of speech and of press, and omit the making of any exception.

If, then we take a broad outlook upon our problem, whether we view it from a standpoint of mere expediency or from the viewpoint of the framers of our Constitution, we must conclude that, under their

guarantees, it is the right of every man to advocate the moral righteousness of anything, even though such conduct has been denounced by the statute as a crime; and that every such advocacy was intended to be protected against punishment, excepting only the one condition, that a criminal act follows, as a direct and designed result of his utterances; and, in that event, he is to be punished for the subsequent crime and his intentional participation in it, and not merely for his utterances, as such.

If, in accord with the intention of their framers, our several constitutions guarantee freedom of speech and press to advocate sedition and revolution, holding individuals responsible only for an actual resultant invasion, then it must follow that Anarchists are clearly acting within their rights so long as they are content merely to talk to those who are willing to listen, and this no matter what may be the opinions which they express.

Some "radicals," who object to a censorship of sex literature, join with others to justify the censorship of Anarchist literature. They would limit freedom of speech at the advocacy of what *they* consider "invasive" crimes, sexual "crimes" not being regarded *by them* as invasive.

Herein they are more reactionary than the conservatives who framed our charters of liberty, and those of us who still rely upon constitutions, because these documents recognize no such exception to our guaranteed freedom of speech and press. Mr. Comstock only disagrees with these "radicals" on what constitutes an invasion. He would tell you that anything which "destroys all faith in God," or "discourages the sinners using common sense and being on the safe side," or impairs or is opposed to the present legalized monogamy, is a direct invasion and destruction of the integrity and very fabric of the social organism. Such "radicals" forget that the line of partition between invasion and defense is always the very matter in issue, and their assump-

tion that all persons are agreed with them upon what is an invasion is a mere begging of the whole question. Necessarily, then every person has an equal right to disagree with any other, and verbally to express that disagreement whether it is about economics, theology, the ethics of sex or of justifiable homicide.

The laws of every civilized country recognize some homicide as justifiable. Laws and opinions differ as to the conditions which make it so. That question is therefore, always a legitimate subject for debate.

I have read of a few theoretical non-resistants, but I doubt if any of these, who have a vigorous flow of good red blood in their arteries and who, under the tortures of the inquisition did avoid anesthesia, would not justify any practical use of violent resistance to such tyranny if exercised upon themselves.

Where is the beginning of tyranny, and where the limit of its silent endurance, and what the necessary degree of directness in fixing the responsibility for it, are all legitimate questions for debate, either in the abstract or concrete. Such discussions are conducive to a better understanding between rulers and the ruled. From the frankest of such criticism the rulers might be warned to re-examine the justice of their laws, as well as to inform themselves, or their partisan defenders, as to where is the need for correcting unjust criticism before a brooding over the matter, under compulsory silence, produces an unwarranted slaughter.

Like all natural phenomena, Anarchists of the violent type are not uncaused effects. If a man has been judicially declared sane enough to be electrocuted, for killing an official against whom he had no personal grievance, then surely the character and ethical sufficiency of his alleged humanitarian justification are a legitimate matter of unabridged inquiry and discussion.

I am not more infallible in my opinions about the ethics of justifiable tyrannicide than I am about those upon sexual psychology, or sexual ethics, or the thirty-nine articles of faith. If, then, I would maintain inviolate my right to express disagreement with others about religion, or another's right to express disagreement with Mr. Comstock about sexual ethics, I must also defend every man's right to express disagreement with me as to what constitutes justifiable homicide or tyrannicide.

For the reasons here outlined, I feel it my duty to protest against all laws which punish the mere expression of unpopular opinions, not having resulted in other acts prohibited by law. Every such abridgment of the freedom of speech or of press is a dangerous precedent from which will grow other like abridgments, until we enjoy any liberties only as a matter of permission and not as a matter of right.

Every such law is destructive of the fundamental equalities of human opportunity, and violative of the rights guaranteed by our constitutions. By these considerations I am impelled, at the risk of being misunderstood, or of deliberate misinterpretation, and of great unpopularity, to insist on both the legislative and judicial annulment of all anti-Anarchist laws, and every other law abridging even in the slightest degree the means of inter-communication between sane adult humans.

IV

THE MEANING OF UNABRIDGED "FREEDOM OF SPEECH"

Revised from Vol. 68 Central Law Journal, p. 227-234.
March 26, 1909.

Among ignorant people, and some who have the reputation of not being so ignorant, there seems to have occurred a considerable doubt as to the meaning of our Constitutional guarantees of an unabridged "Freedom of Speech and of the Press." It is to dissipate a little this fog of doubt that this essay is written. Ignorant men are naturally timorous when they come in contact with things they do not understand, or the public expressions of ideas which, because of their unconventional trend, stimulate fearful emotions. When they seek to explain their absurd and unreasoned apprehensions, and the consequent desire to suppress the expression of an unpopular idea, they always fall back on the imaginary demands of an alleged public welfare.

The most barbarous edicts of the most outrageous tyrants usually speak to the abject wretches who are about to be sacrificed, a kind paternal word of assurance that their persecutors are only promoting the public welfare. This question-begging talk about public welfare requiring the suppression of any idea, no matter what, is misleading because such statements rarely, if ever, express the real motive for suppressing or punishing public discussion, and seldom is anything other than a symptom of stupid sentimentalism, or the mere pretext or sham excuse for the tyrannous violation of constitutionally guaranteed rights.

Those who are willing slaves, through arrested intellectual development, and those who are tyrants, through the excessive lust for power, sometimes coupled with feverish paroxysms produced by hysterical fear, never see any merit in the claim of human liberty as a matter of natural or constitutional right; and so from very different causes these two large classes are always unable to discriminate between a real assault upon the real public welfare and a materially harmless, mere intellectual attack upon their established interests, vanity or superstition.

If the Constitution had said that "legislative bodies shall make no law abridging man's freedom to breathe," no one would have any doubt as to what was meant, and every one would instantly say that of course it precluded government from passing any law which would prohibit breathing according to the mandate of a policeman, before trial and conviction, and that it would equally preclude the passage or enforcement of any law which would punish breathing, merely as such, upon conviction after the fact. No sane man could be found who would say that such a guarantee, to breathe without any statutory abridgment, only precluded the appointment of Commissioners who should determine arbitrarily what persons might be licensed to breathe and who should not be so licensed, and that it would still permit government to penalize all those who do not breathe in the specially prescribed manner, even though such criminal breathing had not injured anyone.

There is not the slightest reason to be given why "freedom" in relation to speech and press should be differently interpreted. The only explanation for having interpreted it differently is that people generally, and petty officials in particular, believe in unabridged freedom to breathe, but emotionally disbelieve in unabridged freedom of speech, and therefore, they lawlessly read into the Consitutions meanings and exceptions which are not represented there

by a single syllable or word, simply because they think, or rather feel, that the Constitution ought not to guarantee freedom of speech and of the press, for those ideas which intensely displease them.

The ordinary and plain meaning of the word "freedom" should readily have solved all problems, if there ever really were any such, which were discoverable by reason, uninfluenced by hysterical emotions and fears. In common parlance, we all understand that a man is legally free to perform an act whenever he may do so with impunity, so far as the law is concerned. Thus no one would claim that another was legally free to commit larceny so long as larceny involved liability of subsequent criminal punishment. No one would say that the law leaves a man free to commit murder so long as we may legally resist the assailant by killing him in self-defense, and there is a law punishing murder. Likewise no man, who is depending purely upon the words of the Constitution, will ever say that we have unabridged freedom of speech and press so long as there is any law which prescribes a penalty for the utterance of anyone's sentiments, merely as such utterance and independent of any actually accomplished injury to another.

THE ABUSE OF FREEDOM

On the other hand, it would seem equally certain, to the ordinary understanding, that there exists no legal abridgment of a man's freedom to speak or write, if he were punishable for the abuse of that freedom, provided we only mean by "abuse" an actual and not a mere constructive abuse; that is, provided he is punished only for an actual, and not a constructive injury, resulting from his utterance. Manifestly in such a case he is not punished for the speech as such, but he is punished for an actual, ascertained, resultant injury, to some one not an undeceived voluntary adult participant in the act.

His utterance in that case may be evidence of his complicity in, or contribution to that actual injury,

and punishment for an actual resultant injury is not in the least an abridgment of the right to speak with impunity, since manifestly it is not a punishment for mere speaking as such, the essence of criminality—the criteria of guilt—being something other than the utterance of his sentiments. Manifestly in this view, which is but the natural import of the words "freedom of speech and of press," the expression can only mean that every man under the law shall have the equal right and opportunity of every other man to utter any sentiment that he may please to utter, and do so with impunity, so long as the mere utterance of his sentiments is the only factor in the case. It does not exempt him from punishment as an accessory to murder, arson or other actual and resultant injury, but leaves it where he may be punished for his contribution toward and participation in bringing about these injuries, but not until they have become realities. His utterances may be evidence tending to show his responsibility for the actual injury which is penalized, but the penalty attaches on account of that injury, and can never constitutionally be predicated merely upon the sentiments uttered, without, to that extent, abridging our freedom to utter. When the statute or the police officer does this the constitutional right is violated, notwithstanding the courts sometimes hold otherwise. The chief abuse of free speech consists in punishing one for an utterance which actually did no material harm to anyone, no matter how outrageous it may seem to moral sentimentalists.

AS TO PREVIOUS RESTRAINT.

Both the words "speech" and "press," as used in our constitutions, are limitations upon the word "freedom" as therein used. The purpose of this clause is to preclude the legislative abridgment, not of all liberty, but of liberty only in relation to two subjects, to wit: "speech" and "press." It is manifest therefore that the same word "freedom" cannot

change its meaning according to whether the utterance is oral or printed. In other words "freedom" must mean the same thing whether it relates to "speech" or "press." Our American courts have repeatedly held that "freedom of the press" means the absence of all restraint previous to publication.

Freedom of speech, by parity of reason, therefore means, at least, the freedom to speak freely without any restraint previous to utterance. Furthermore, there never was a time when a censor assumed to pass upon oral speech, prior to its utterance. Unpopular oral speeches were only punished after utterance. The whole controversy over "freedom of speech" was a demand that speakers might be free from such subsequent punishment as well as previous restraint, for those of their utterances which in fact had not actually injured anyone, and it was that controversy which the framers of our constitutions intended to decide for all time, by guaranteeing to all the equal right and opportunity, so far as the law is concerned, to speak one's sentiments upon any subject whatever, including even treason and assassination, and with absolute impunity so long as no one was actually injured thereby, except by his voluntary and undeceived consent, as when the person is convinced to the changing of his opinion about some abstract doctrine of morals or theology, the acceptance of which his neighbors might deem a deterioration, and the new convert esteems it a moral and intellectual advance. If as I believe this is the inevitable interpretation of "freedom" in relation to "speech" and the meaning of "freedom" in relation to "press" must be the same, then we are irresistibly forced to the conclusion that many have been wrong in asserting that "freedom" in relation to the press means only the absence of a censorship prior to publication without enlarging those intellectual liberties which are beyond the reach of legislative abridgment. This then precludes punishment subsequent to utterance, unless actual injury has resulted.

When we come to make an historical study of the meaning of "freedom of the press" we will at once discover that the personal elements disappear, to be replaced by humanistic considerations. Now it is not merely a question of previous restraint, of imprisonment or fines, but a question of intellectual opportunity;—not only a question of the opportunity to speak, but of the more important opportunity of the whole public to hear and to read whatever they may choose, when all are free to offer. Now it ceases to be a matter of the personal liberty of the speaker or writer, and must be viewed as a matter of racial intellectual development, by keeping open all the avenues for the greatest possible interchange of ideas, without discrimination even against those of supposed evil tendency. In this aspect the most important feature of the whole controversy simmers down to this proposition, namely: that every idea, no matter how unpopular, so far as the law is concerned, shall have the same opportunity as every other idea, no matter how popular, to secure the public favor. Of course only those ideas which were unpopular with the ruling classes were ever suppressed. The essence of the demand for free speech was that this discrimination should cease. In other words, every inequality of intellectual opportunity, due to legislative enactment or arbitrary police interference, was and is an unwarranted abridgment of our natural and constitutional liberty, when not required by the necessity for the preservation of another's equal right to be protected against actual material injury.

Among the reasons underlying this interpretation of our Constitution, and the very instrument itself, the following is most concisely and most convincingly stated by Prof. Cooper in these words:

"Indeed, no opinion or doctrine, of whatever nature it be, or whatever be its tendency, ought to be suppressed. For it is either manifestly true or it is manifestly false, or its truth or falsehood is dubious.

Its tendency is manifestly good, or manifestly bad, or it is dubious and concealed. There are no other assignable conditions, no other functions of the problem.

"In the case of its being manifestly true and of good tendency there can be no dispute. Nor in the case of its being manifestly otherwise; for by the terms it can mislead nobody. If its truth or its tendency be dubious, it is clear that nothing can bring the good to light, or expose the evil, but full and free discussion. Until this takes place, a plausible fallacy may do harm; but discussion is sure to elicit the truth and fix public opinion on a proper basis; and nothing else can do it."—Cooper's "A Treatise on the Law of Libel and the Liberty of the Press," p. xxi.

This last quoted argument never has been answered and never will be. Unfortunately, uncultivated minds are usually so constituted that they may readily endorse such a general idea as that presented by Prof. Cooper, and yet shrink from an endorsement of a particular instance which comes clearly within the principle. As for myself I can see no flaw in the quoted statement of Prof. Cooper and I am entirely willing to apply it to every conceivable particular. Accordingly, I am led to affirm my concurrence in the following words from the pen of a former member of the English Parliament, the Hon. Auberon Herbert. He wrote:

"Of all the miserable, unprofitable, inglorious wars in the world [the worst] is the war against words. Let men say just what they like. Let them propose to cut every throat and burn every house—if so they like it. We have nothing to do with a man's words or a man's thoughts, except to put against them better words and better thoughts, and so to win in the great moral and intellectual duel that is always going on, and on which all progress depends."—Westminster Gazette, Nov. 22, 1893.

The sentiments just quoted I believe to be expres-

sive of the true meaning of our constitutional guarantees for an unabridged freedom of speech and of the press:—

I. Because in accord with the logical requirements of natural law;

II. Because in accord with the exact signification of the constitutional language;

III. Because supported by the historical interpretation of our Constitutions, which I have not been able to discuss in this brief essay. (This is discussed at length in "Obscene Literature and Constitutional Law."

V

ERSKINE ON THE LIMITS OF TOLERATION

AMONG English speaking people, Thomas Erskine is almost the only man who has rendered either conspicuous or effective service, in the forensic defense of a larger freedom of speech. Some of his utterances upon this subject are judicially quoted as authority upon the meaning of our constitutional guarantees for unabridged liberty of utterance. This raises the question how far may we properly quote Erskine as such an authority? What were his real convictions about the limits of toleration? Should it be considered hazardous to quote, as authority, isolated passages from Erskine's speeches, for the purpose of justifying the limitation of toleration, even though we could be positive that he was always untrammelled in the absolutely frank expression of his opinion upon this subject?

It is regrettable that Erskine left no academic discussion freely and fully setting forth in unequivocal terms just what was his opinion about a legally limited toleration. At least to lawyers, it must be manifest that in the defense of an accused, under conditions then existing for Erskine, the exigencies of professional duty usually would preclude any lawyer from defending a belief in *unabridged* freedom of speech, even though he actually believed in it. Under the English system it would have been absurd to have based a defense upon the broad proposition that the unwritten constitution prohibited *all* laws anywise abridging freedom of utterance. In his contentions, as to what was the existing law under which he was serving a defendant, it became Erskine's plain duty to claim, or defend, no broader

principles of liberty than were necessary for the acquittal of each particular client. In and for the purposes of every case defended by him, his manifest obligation and interest was to assume for his client the least possible burden, and this obligation tended to induce the maximum of concessions, to the prosecution, consistent with the acquittal of his client. His duty to his client was to secure the most favorable interpretation of the existing laws then abridging freedom of speech and not to indulge in academic discussions for their ultimate total abolition. These considerations impose the inference that even if Erskine had believed in *unabridged* freedom of utterance, its defense could hardly have been the essence of his forensic discussions, and, if in these it found expression at all, it would be only in an inadvertent or incidental way.

This brings me back to the question: Did Erskine really believe in *unabridged* liberty for the utterance of one's opinions? If not, his opinions cannot be properly used as an aid to the interpretation of our constitutional guarantees. If he did believe in *unabridged* freedom of speech, then, it seems to me, our courts have perverted his sentiments in order to make them an authority for the curtailment of our liberty, in spite of our constitutions. May it not be that our courts have ignored Erskine's real opinions, to explain away our constitutional guarantees by quoting, from him, isolated passages, dictated by expediency, or expressing only the facts of practice, under a system of limited liberty by permission, and so actually misrepresenting the real Erskine, by mistaking such utterances as general standards by which to define and determine the existence of *unabridged* freedom of speech.

It does seem to me that in this matter, if we content ourselves with such superficialty as our courts have used, it would be very easy to prove that Erskine did not at all believe in *unabridged* freedom of speech, and therefore is not in the least an author-

ity on the construction of the free-speech clauses of our constitutions. Did not Erskine successfully prosecute Paine's *Age of Reason* which no public prosecutor, or court, in America has ever asserted to be beyond the protection of our constitutional guarantees of free speech? Commenting upon the apparent conflict between his speech prosecuting Paine's "Age of Reason" and that other speech of his in defense of Paine's "Right of Man," the editor evidently wishing to establish for Erskine a reputation for general conservatism, said of his defenses of liberty, that these "we can only consider as the argument of an advocate bound to give the best assistance to a client," but that speech of Erskine's demanding the abridgment of freedom of the press, the editor assures us, "may be considered as containing his [Erskine's] own opinions and principles."[1]

When we thus find Erskine cited as an authority both for and against *unabridged* freedom of speech, we are forced to conclude that his real opinions on the limits of toleration must be found, if found at all, in those little incidental indiscretions of his arguments which are deemed indiscretions because unnecessary to the immediate purposes of his client's defense, and in the nature of a claim against his interests, because a claim of either too much or too little, for his client's good. At times such indiscretions are quite unavoidable by persons very much in earnest, and they arise out of the psychologic difficulty of adhering to the limitations of a special plea, when such limitations conflict with, or do not include all that is essential to a correct portrayal of the pleader's convictions. Did Erskine portray his real convictions by any such inadvertencies?

To my mind, one of the essential tests of unabridged freedom of speech is this, that no man shall be punished criminally for any utterance of his, upon any subject, no matter how offensive, or how dangerous may be its tendency, when that tendency is only

[1] Erskine's Speeches, Vol. 2, p. 183-184, edition of 1810.

speculatively, prospectively and imaginatively ascertained. This admits the right to indulge, with impunity, even in the fruitless advocacy of "treason" and of course the lesser crimes, and demands that men should not be punished for a mere psychologic offense, unconnected with criminal intent and with overt acts of invasion, or with any actually ascertained and resultant material injury.[2]

How then did Erskine stand with reference to unabridged freedom of speech, according to this test, which requires that speech, *merely as such,* shall always be free, and that actual and material resultant injury, or an act with the imminent danger thereof, according to the known laws of the physical universe, shall be always one of the conditions precedent to the punishment of a mere speaker? Intent should be another.

The following extracts from Erskine's published speeches are the answers to my question. These are the spontaneous inadvertencies which I believe portray his real convictions upon this issue now under consideration. The italics used are mine.[3]

"I maintain that opinion is free, and that conduct alone is amenable to law.

"The principle is this that every man, while he obeys the laws [prohibiting invasive acts], is to think for himself, *and to communicate what he thinks.* The very ends of society exact this *license,* and the policy of the law, in its provisions for its security, has tacitly sanctioned it. The real fact is, that writing against a free and well proportioned government, need not be guarded against by laws. They cannot often exist and never with effect."[4]

[2] For a more complete statement and justification of this view see Central Law Journal, Mch. 26, 1909, and Mch. 7 to 28, 1910; MOTHER EARTH, June 1907-May 1910. These are incorporated in "Obscene Literature and Constitutional Law."

[3] Erskine's Speeches, Vol. 2, p. 104, Paine Case.

[4] Erskine's Speeches, Vol. 2, p. 133, Paine Case.

"I am not contending for uncontrolled conduct, but for freedom of opinion."[5]

"Chief Justice Wright (no friend to the liberty of the subject) * * * * interrupted him [The Attorney General] and said, 'Yes, Mr. Attorney, I will tell you what they offer, which it will lie upon you to answer; they would have to show the jury how this petition HAS disturbed the government, or diminished the King's authority.' So say I. I will have Mr. Bearcroft [the attorney, then prosecuting] show you gentlemen [of the jury] how this Dialogue [of the Dean of Asaph which was the basis of the charge] HAS *disturbed* the King's government, excited disloyalty and disaffection to his person,—*and stirred up disorder* within these kingdoms."[6]

"It is easy to distinguish where the public duty calls for the violation of the private one; criminal intention but not indecent levities, not even grave *opinions unconnected with conduct are to be exposed to the Magistrate.*"[7]

"Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it [the venerable law of England] leaves to *us our thoughts, our opinions and our conversations and* PUNISHES ONLY OVERT ACTS, of contempt and disobedience to her authority. Gentlemen, this is not the specious phrase of an advocate for his client, it is not even my exposition of the spirit of our constitution; but it is the phrase and letter of the law itself."[8]

"What is it that has lately united all hearts and voices in lamentation? What but these judicial executions, which we have a right to style murders, when we see the axe falling, and the prison closing upon the genuine expressions of the inoffensive heart; sometimes for private letters to friends, *unconnected with conduct or intention;* sometimes for momentary

[5] Erskine's Speeches, Vol. 2, p. 159, Paine Case.
[6] Erskine's Speeches, Vol. 1, p. 205, St. Asaph's Case.
[7] Erskine's Speeches, Vol. 2, p. 343, Frost Case.
[8] Erskine's Speeches, Vol. 2, p. 346, Frost Case.

exclamations in favor of royalty or some other denomination of government different from that which is established."[9]

These statements of general principle, made by Erskine, and usually quite outside the necessary issues of the cases in which they were uttered, I believe give us warrant for asserting that he believed in *unabridged* freedom of speech as a natural right, and that by unabridged freedom of speech he meant substantially the same thing as that for which I have contended.

That Erskine believed in the fundamental right of everyone to advocate even treason is further shown by his reasoning. He said: "When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."[11]

However, it must be admitted that, nothwithstanding his repeated clear enunciation of the general principle that no guilt can be predicated except upon overt act and criminal intent, it was not always consistently reaffirmed by him in all particular cases. The prosecution of Paine's "Age of Reason" is an example. The exigencies of professional obligation adequately explain this seeming inconsistency, and it is possible that his religious and emotional nature also had something to do with the seeming inability to make conclusive deductions from his general principles to every specific case that came within them.

And yet even in this case of Williams there is some evidence to show that Erskine was not deeply interested in the suppression of blasphemy.

[9] Erskine's Speeches, Vol. 2, p. 353, Frost Case.

[11] Speeches of the Hon. Thomas Erskine, Vol. 2, p. 141, 1810.

After securing the conviction of Williams and before sentence was passed Erskine learnd of the poverty and illness of the convict and refused to proceed tc judgment. When the Society for the Prevention of Vice declined to join him in praying the court tc mitigate the punishment he refused to accept his fee and withdrew from the case, "because they loved judgment rather than mercy."[10]

The English governmental machinery certainly left Erskine quite helpless, in his efforts to secure the adoption of these general principles into the juridicial system. Only two methods were open. The one was to secure a written constitution, such as was once supposed obtained in America, inhibiting all legislative abridgment of freedom of speech; and the second was to secure a universal acceptance of his general principle and its application to every conceivable case, such as is essential to make a constitutional prohibition effective, and which principle might occasionally be made effective without a written constitution, if juries could be permitted to rejudge the law for themselves.

Erskine lived long enough to see, in America, the passage of the Alien and Sedition law, in spite of the restraint of our American constitution, and this showed him how useless are paper constitutions, if the people do not possess an enlightened view of the pernicious power which such constitutions are intended to destroy. Perhaps he even foresaw this in 1793 when he made his famous statement before the "Friends of Liberty of the Press," wherein he, seemingly at least, abandoned his oft repeated demand for absolute certainty in the criteria of guilt.[12] In

[10] Penalties upon Opinion, 94; citing Autobiography of Mrs Fletcher, ed. 1875, p. 137.

[12] For this demand see, in the edition of 1810, as follows: Vol. 1, pp. 72-73-77-78-129-182-186-331-333-334-337; pp. 143-162-190-268; Vol. 3, pp. 338-356-439-497; Vol. 4, pp. 436-437. For my own literature on this subject see "Due Process of Law in Relation to Statutory Uncertainty and Constructive Offenses," and Cent. Law Journ., Dec. 18, 1909. All these and

this carefully prepared statement he said this: "The extent of the genuine Liberty of the press on general subjects, and the boundaries which separate them from licentiousness, the English law has wisely not attempted to define; they are indeed in their nature undefinable; and it is the office of the jury alone to ascertain them."[18] This statement was made in support of his contention that juries should be authorized to decide the law as well as the facts. In America our Constitutions have attempted to define the boundaries of genuine liberty of the press by saying that it shall remain unabridged.

I said Erskine *seemingly* abandoned this demand, but it was only *seemingly,* for in this same paper he again denounces the uncertainty of the laws for seditious libel, and the infamous system of spy-societies which then, as now, inflict their unctuous piousity on a dull, and consequently patient, public. So then I conclude that Thomas Erskine was a true believer in a real unabridged liberty of utterance, where no man could be punished so long as the mere verbal portrayal of his ideas is the only factor involved.

In England, about a century ago Thomas Erskine, with such a record, was made Lord High Chancellor. In America, at the present time, such statements would put him only in the class "undesirable citizen" to be specially criticised, and denounced as an anarchist especially by many of those claiming to be "liberals" or "radicals," of the "respectable" type. Thus we have another illustration that English royalty a century ago was less afraid of real liberty than the American mass of to-day; and herein we also see how the very essence of tyranny thrives under the forms of democracy. With us every stupid policeman, fanatical judge, or moralist for revenue, can successfully abridge freedom of speech by the lawless use of power, and the hysterical mob of pretend-

other articles of mine appear in "Obscene Literature and Constitutional Law."

[18] Erskine's Speeches, Vol. 4, p. 439.

ing lovers of liberty and democracy will stand by and applaud,—so low have we fallen since our American Constitutions were written.

On Seditious Opinions

By

REV. ROBERT HALL

THE law hath amply provided against *overt acts of sedition and disorder*, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end.

VI

LIBERAL OPPONENTS AND CONSERVATIVE FRIENDS OF UNABRIDGED FREE SPEECH

Condensed from a Lecture Delivered before the Brooklyn Philosophical Association, March 13, 1910.

IN the present contest for the unabridged freedom of speech guaranteed by our Constitutions, the sources of irritation and agitation are three. The first is Socialist groups, among which the most acute recent crisis came in Spokane, Washington. The issue there was one of time, place, and manner, rather than a question of the subject matter of the offending speeches. No doubt, the real secret motive behind the police activity was a vague hatred and fear of Socialism, but no definite issue was made over the right to advocate any specific doctrine. The only issue tendered by the authorities was as to the right to use the streets for purposes of agitation, and the right to conspire to violate alleged ordinances regulative of street oratory. These issues are of practical importance, as a means to an end for those wishing to use this method of propagating their tenets, but seldom offer definite controversy over *free speech principles*, such as are capable of academic discussion.

The second source of free speech agitation has come chiefly through my own effort in defense of freedom of sex-discussion, which naturally led me to a consideration of the right to advocate other doctrines of disapproved, and even criminal, tendencies. Here definite statements of principles are asserted

and denied. On these issues some of our liberal friends have taken sides, and their contentions will be somewhat discussed. My consideration of the right to advocate crime connects me in a subordinate way with another center of free speech interests.

The third focus of irritation in relation to free speech is Emma Goldman, in her effort to secure a hearing for Anarchism. The reason assigned for suppressing Emma Goldman's speech is the fear that evil consequences will come as the result of her utterances. It is believed that these evils arise directly from her intellectual attack upon religion, the legally maintained family, and from her attacks upon our economic structure and coercive government.

It is claimed that because of these elements, or of some of them, her speeches have a *tendency* to lawlessness and riot. It is seldom claimed, and never truthfully claimed, that any riots have followed her speeches. Once she was convicted and punished on the pretense of inciting to riot, though no riot occurred. The official justification for suppressing Emma Goldman is in effect the assertion of a rightful power officially to suppress in advance of utterance, and punish after the fact, all discussions which are suspected or believed, even remotely and indirectly, to produce evil results. (However, I am glad to see that the hysteria over Miss Goldman and Anarchism is subsiding a little.)

The issues and arguments thus presented by the suppression of Miss Goldman, and of sex-discussion, should be fairly and frankly answered, or supported by our liberal friends. It seems to me that this has not been done, and I am going to call attention to this record for the purpose of exhibiting what seem to me to be the evasions and mistakes my liberal friends have made, in the hope that some may be dissuaded from the repetition of their folly, which may have been induced by an excessive zeal for retaining a speaking acquaintance with respectability.

One of the first essays I wrote in defense of free-

dom for sex-discussion was a paper presented to the XV International Medical Congress held in Lisbon, Portugal.[1] There I argued that the only thing common to all "obscenity," is a subjective emotional condition. In other words, I tried to make a scientific demonstration that unto the pure all things are pure. Later, I wrote of obscenity and witchcraft as twin superstitions, asserting that both would cease to be when people ceased to believe in them. Now let us see how our liberal friends met the argument made in support of that contention.

OUR LIBERAL EDITORS.

The Truth Seeker, probably the best of our Agnostic papers, editorially expressed its unconscious desire to help Mr. Comstock. The late editor wrote: "We have little confidence in this argument and would enjoy seeing it demolished."[2] I promptly sent the editor another copy of the essay and a letter requesting that he demolish the argument, by pointing out errors of fact or logic. Profound silence was the only answer. However, other liberal friends were not disposed of so easily.

The editor of *Secular Thought,* the best free thought paper published in Canada, wrote: "In our humble opinion, such an argument is childish in the extreme,"[3] but he did not even attempt to answer it.

Dr. Robinson, who edits several magazines and claims to be a "sane radical," without criticising my argument assured his readers that "This argument is exceedingly childish."[4] He also thought a popular dogmatism was a sufficient answer.

Mr. Comstock showed himself to be in entire harmony with these dogmatizing liberals. He comments in these words: "It is all right, from the mere standpoint of debate and discussion, to theorize and say that there is no such thing as an obscene book or

[1] See Proceedings, also *Albany Law Journal,* July, 1906.
[2] *Truth Seeker,* June 29, 1907.
[3] *Secular Thought,* August, 1907, p. 312.
[4] *Altruria,* June, 1907, p. 1.

picture. The man who says it simply proclaims himself either an ignoramus, or is so ethereal that there is no suitable place on earth for him."[5] In a letter to me he explained that he was too busy to point out defects in my argument.

HAVELOCK ELLIS' STUDIES IN PSYCHOLOGY OF SEX.

Since these liberals thought it unadvisable to answer my argument, and were satisfied merely to express their emotional disapproval of my conclusions, I may content myself with an approving quotation, from one who does not advertise his radicalism, but is a mere scientist and happens to be the world's most famous sexual psychologist. The following words are from his last (sixth) volume of "Studies in the Psychology of Sex": 'Anything which sexually excites a prurient mind is, it is true, 'obscene' *for that mind,* for, as Mr. Theodore Schroeder remarks, obscenity is 'the contribution of the reading mind.' "[6] I think with this endorsement of my conclusion, and my unanswered argument, I can let this issue rest.

Dr. Robinson made argumentative comment which is in the nature of a confession and avoidance. He wrote: "And so [as in the case of beauty and ugliness] it is in regard to obscenity. The thing in itself is not obscene; in the midst of the desert, or at the bottom of the sea, it is not obscene. But if it induces some people, however small a number, to commit indecent, unhealthy things, then that thing *is* indecent, and no amount of sophistry can do away with the fact."[7] He of course fails to see that he is only restating the argument formerly made in support of witchcraft. How absurd for a man with some of the credentials of a scientist, to argue that something which is not obscene in itself can be made so by vote. Had he read my argument intelligently he would have seen that by his last test even "Uncle Tom's

[5] *The Light,* January, 1907, p. 61.
[6] Studies in the Psychology of Sex, Vol. 6, p. 54.
[7] *Altruria,* ——— 1907, p. 2.

Cabin" comes under his condemnation as an obscene book.

There is another type of comment upon my argument, also in the nature of a confession and avoidance because it does not attack the argument itself, but which deserves more explicit criticism than it has hitherto received. The matter is well presented by the editor of *Secular Thought,* who no doubt believed he had delivered a stunning blow when he wrote this: "Would Mr. Schroeder take a virtuous and modest lady friend to a Seeley dinner? If not, why not? The lady would not see anything obscene, because nothing objectively obscene exists, and consequently she would not blush or be shocked in the least. Would he take home a brutal, coarse-mouthed jade from the Bowery and expect his wife to be entertained by her filthy jests? Would he show a number of so-called 'obscene' transparent picture-cards to his daughters and expect them to be edified thereby? Have Free Speech extremists made an alliance with Christian Scientists?"[8]

If a woman is afflicted with the modesty of prurient prudery, then I would not take her either to a Seeley dinner or to the Metropolitan Museum of Art. If she was modest only in the sense of having a clean, healthy mind and body, I might take her to either place. Such a woman as I have postulated has viewed her own body without shame, or injury to herself, and would not be any more injured by other sights of mere nudity in art or nature. The experience of art students in life studies is a proof. If I refused to take a woman to a Seeley dinner, it would not be because there was any obscenity in the mere nudity of the dancer, but on account of the probable obscenity in the mind of other spectators, and who, by reason thereof, might make themselves disagreeable. It is these disagreeable experiences which come from associating with the coarse-mouthed jade of the Bowery, or the spiritualized sensualism of the

[8] *Secular Thought,* Aug., 1907, p. 312.

lewd purists, or the impudence of the avowed voluptuary, which alone makes truly decent people avoid nudity, when such are around. It is not the obscenity in the nudity, but that obscenity which is in the minds of some excessively lewd co-spectators, which I would seek to avoid, for myself and for my women friends. It is evident, therefore, that the questions propounded by the editor of *Secular Thought* do not in the least degree impair or answer my argument.[9]

VARIOUS CONCEPTIONS OF FREEDOM.

From the comment presently to be quoted it appears that these editors, like Mr. Comstock, believe in a limited liberty by permission and do not see that my only object is to secure an unabridged and an unabridgable freedom of utterance as a matter of constitutionally guaranteed, natural right. I am opposed to all mere psychologic crimes; they are not. Failing to see this difference, they scold me for injuring this cause of freedom because I am asking for a liberty which they are willing to destroy. One of these editors thus condemned my effort to secure unabridged freedom of utterance: "We certainly look for and work for more liberal laws than those under which we live at present, but we imagine they can only be enacted through an enlightened public sentiment, and we think their advent will be retarded rather than assisted by such ultra-rationalism as that of Mr. Schroeder."[10]

Dr. Robinson scolded me for seeking the *unabridged* right to hear and read, which by the constitution is guaranteed to me and every other adult. This is what he said: "I wish to add that you would do the cause of free press a much greater service if you admitted openly that you do draw the line at nasty 'literature' and filthy 'art,' the purpose of which is exclusively to pander to the vices of imma-

[9] See Psychologic Study of Modesty in *Medical Council*, January, 1909.

[10]) *Secular Thought*, Aug., 1907, p. 811.

ture youths and degenerate *roués*. If you claim that we must not draw the line anywhere, you destroy your usefulness, and rational, normal people cease to consider you seriously."[11]

So strenuous is he in his insistence that I should be content with a limited intellectual liberty as a matter of permission only, that he even thought it necessary to falsify my contention. In an article on "What we would have to maintain to find favor with certain 'Radicals,'" he wrote a paragraph manifestly intended for me. It reads thus: "That there is no such thing as obscenity, and that all the pornographic filth sold secretly to young boys and old *roués* is *pure and noble literature,* and is declared filthy only by mentally strabismic and over-sensitive purists."[12]

The editor of *The Humanitarian Review,* in order to justify himself in the matter of abridging my freedom to read what I please, was unconsciously driven to adopt the Anarchist position that the cooperation of which the State is the embodiment, has its moral justification only in the consent of the entire community. He wrote: "There is not, never was, and never can be such a thing as *absolute* liberty or freedom (of speech or other kind of human conduct) of men in association. * * * * * Society has the right, by *his own agreement with it, to restrain him from doing (or saying, if you will)* things harmful to society or any of its individual members."[13] If I denied ever having made such an agreement, I suppose this "rationalist" would tell me I was simply ignorant of what I had done in a former incarnation.

Thus this "liberal" editor justifies every persecution which has ever blighted the human intellect, for all persecutors have claimed that the persecuted one uttered something "harmful to society." If by that

[11] *Altruria,* June, 1907, p. 3.
[12] *Altruria,* March, 1908. (Italics are mine. T. S.)
[13] *Humanitarian Review,* September, 1908, p. 108.

phrase he had meant an actually realized material injury, he would have agreed with me. But he is evidently willing to punish imaginary and constructive injuries.

SIR OLIVER LODGE ON OBSCENITY.

Now let me contrast the foregoing views with those of mere conservative scientists and thinkers who believe in more intellectual liberty than these radicals whom I have quoted. Sir Oliver Lodge recently said: "And lower than these [trashy, cheap novels] there lurks in holes and corners pernicious trash written apparently with the object of corrupting youth—if that horrible and barely human suggestion can be tolerated; but this is not literature, nor does it pretend to be, or if it does, it can only do so by obvious cant. *The way to root out this abomination is to cultivate the soil round the growing organism, to strengthen the phagocytes of its own system, to make it immune to the attacks of vermin.*"[14]

I will quote another who had similar views, and yet was so conservative and respectable that even Mr. Comstock says he ought to have known better:

"The tares of error must be left to grow in the same field with the wheat of truth, 'until the harvest'—that is, until they bear their natural fruits and their true character reveals itself *in actual deeds*—when they may be rooted up, in the persons of those who illustrate them, and cast into the fiery furnace of the law!"[15]

THE NUPTIAL OF FILTH AND AGNOSTICISM.

I am now going to quote a few paragraphs from authors who imagined themselves to be great antagonists, and I am sure that few could guess their names, merely from reading the following extracts, or, knowing their names, few could guess which part belongs to each.

[14] *Fortnightly Review*, Feb. 1910, p. 264. Italics are mine.

[15] Oliver Johnson, *Orange Jour.* N.J., Aug. 24, 1878, requoted from "Frauds Exposed."

"Suppose some man has been indicted, and suppose he is guilty. Suppose he has endeavored to soil the human mind. Suppose he has been willing to make money by pandering to the lowest passions in the human breast. What will that [defense] committee do with him then? We will say, 'Go on; let the law takes its course. * * * * * There is not a man here but is in favor, when these books and pictures come into the control of the United States, of burning them up when they are manifestly obscene. You don't want any grand jury there. * * * * * It is easy to talk right—so easy to be right, that I never care to have the luxury of being wrong." * * *

"I believe in liberty as much as any man who breathes. * * * * Every man should be allowed to write, publish, and send through the mails his thoughts upon any subject, expressed in a decent and becoming manner."[16]

"I accord to every man the fullest scope for his views and convictions. He may shout them from the housetop, or print them over the face of every fence and building for all I care."

"There never had been a man arrested under these laws, except for sending obscene and immoral articles or advertisements through the mails; there was but one reason why these laws should be repealed, and that was, because it interfered with their infamous traffic, and prevented these scoundrels from using the mails of the United States for their base purposes."[17]

"I am not in favor of the repeal of those laws. I never have been, and I never expected to be."[18]

"It is a question, not of principle, but of means."[19]

Thus Ingersoll and Comstock are quite in harmony that something ought to be suppressed by arbitrary and lawless power, without accusation or

[16] Ingersoll, As He Is, pp. 116-124-128-129-131.

[17] "Frauds Exposed," by Anthony Comstock, pp. 408-420-421.

[18] Ingersoll, As He Is, p. 129.

[19] Ingersoll, As He Is, p. 132.

trial. However, they were not agreed as to all that should be included within the arbitrary power. Ingersoll as a lawyer saw that frequently evil results came from the fact that obscenity could not be defined. He sought to remedy this by having the statute so amended as to make intent the essence of the offence. When the motive of the accused was to benefit society, no matter how mistaken he might be, Ingersoll would acquit. This much is to be credited to his generous impulses. He did not see that courts would have wiped out such a statute by saying that the accused must be presumed to have intended the evil consequences, which a hostile judge would imaginatively and prospectively ascribe to the indicted literature, as the natural consequences of the act of the accused person.

Ingersoll failed to see another thing. In proposing to punish a man for having an evil intention, independent of any actual and material injury having flowed from it, he too was getting back to the evil basis of all persecution, namely a proposal to punish the mere psychologic crime of having an evil state of mind which had actually injured no one. That Ingersoll should have been guilty of this does not speak well for his intellect. Of this proposition I shall have more to say later on.

LIBERALS ON THE RIGHT TO ADVOCATE CRIME.

I soon saw that the Constitutions made no exception for any particular class of intellectual "evils," but protected them all alike, so long as the mere utterance of one's sentiments was the only factor involved. Thus, the advocate of crime might be punished as an accessory before the fact if a crime actually resulted from his advocacy, but could not be punished for his utterance, merely as such. Upon this proposition several of my radical friends took more or less definite issue with me. Mr. Edwin C. Walker, who usually sees very clearly in such matters, yet failed to see the importance of a precedent allowing one exception to unabridged freedom,

wrote the following words:

"Even to argue for the right or alleged right to advocate the performance of criminal acts, on the ground that without unrestricted freedom for such advocacy of invasion the right to liberty of expression is denied, is to sacrifice essential substance to empty form. * * * * * *What may or may not be a theoretical right in the premises is relatively unimportant; what is important, is the fact that to insist that we have such a right* is to menace and cripple our defensible right of expression, to seriously limit, if not destroy, our opportunity to teach and persuade. It is enough for us to affirm the right and benefit of the utmost freedom for the discussion of all suggested peaceful changes in belief and society, and to keep it ever before all the authorities that in the long run their tenure of office depends far more on non-interference with even the most incendiary utterance than on suppression of that utterance."[20]

A century ago, when a similar argument was made for the unimportance of a little tax levied for the support of a particular church, Dr. Priestly made the answer that "A penny of a tax is a trifle, but a power imposing that tax is never considered as a trifle, because it may imply absolute servitude in all who submit to it." The few who may care to exercise the right to advocate what everybody else admits an evil may be relatively unimportant, but the power to suppress them merely on account of a speech the evil tendency of which is only speculatively, prospectively, and imaginatively ascertained, is the admission of a power to enslave the mind of all, and upon all subjects. Our Constitutions make no distinction.

Mr. Walker is very much interested in the question of freedom for sex-discussion. I can best show the evil of his admitting the power to suppress any mere expression of opinion by quoting an address made before the National Purity Federation by the

[20] Liberty and Assassination, by E. C. Walker. (Italics are mine. T. S.)

Rev. Charles Carverno. He said:

"Let us look at a case that is somewhat plain. The police of this city will break up a gathering and prohibit speeches whose intent, or evident tendency, is to excite to acts of Anarchy. Why should not the same attitude be observed and the same action taken when a play is put on the boards whose tendency is to cultivate indifference to sex crime? There is sex Anarchy as well as political or civic Anarchy. It is as important that society be protected against the one as against the other. The family, and that too predominately monogamic, is older than the State —it is the MORE basic condition and relation."[21] Thus do Mr. Walker's chickens come home to roost, if I may adapt that homely proverb. We need to learn the solidarity of all liberty.

Mr. Louis Post, who edits the best American newspaper devoted to fundamental democracy, attacks my argument more directly. He said: "To us it seems that the man who so advises another to commit a crime as to make himself an accessory before the fact, if the crime be actually committed, should be criminally liable though the crime be not committed." * * * "If it be destructive of freedom of speech to punish advocacy of crime when the crime advocated does not result, then it must be destructive of freedom of speech to punish advocacy of crime when the crime advocated does result. * * * Without the criminal intent, of course they should not be [punished]. But with the criminal intent, why not punish, whether the intended injury occurs or not?"[22]

ON PUNISHING UNDESIRABLE STATES OF MIND.

Like Ingersoll, in the case of "obscenity," Post, in the case of advocacy of crime, would punish a mere undesirable state of mind, although no actual or material injury to any one has actually resulted therefrom. According to my way of thinking, this proposition implies the uttermost limit of outrage

[21] *The Light*, Nov. 1906, p. 236.

[22] *The Public*, May 15, 1908, pp. 147-148.

upon liberty of conscience. If there exists a power which can punish any mere psychologic "crime," I see no reason why it may not punish every other psychologic offense, for then no limit exists which ignorance, passion, or idiosyncrasy need respect.

Montesquieu tells us of a case of inquisition to discover, and punish, a man for having an unpopular state of mind. He says: "Marsyas dreamed that he had cut Dionysius's throat. Dionysius put him to death, pretending that he would never have dreamed of such a thing by night if he had not thought it by day. This was a most tyrannical action, for though it had been the subject of his thoughts, he had made no attempt toward it. The laws do not take upon them to punish any but overt acts."[23] This inference as to a "criminal" state of mind was no less logical than those which usually underlie the determination of criminal intent. It was as proper to punish that unpopular state of mind, or desire, as though it had been ascertained by other evidence.

But that was in Greece about fifteen hundred years ago, and yet substantially the same thing occurred only a few centuries ago, though the "undesirable" state of mind was revealed in a little different manner. Fabian, in his Chronicle, tells us of a Welshman "drawen, hanged, and quartered for prophesying of the kyng his Majesties death."[24] But why not, if any mere state of mind, unaccompanied by actual injury, can be made a subject of criminal punishment?

If it be crime to try to inculcate an unpopular idea in others, then certainly it should be a crime to possess that same undesirable state of mind. In England one Peachman was found to possess an undelivered manuscript-sermon, with passages encouraging resistance to tyrants, and denunciatory of royalty. He had also denounced his Bishop. He was

[23] Spirits of the Laws, V. I., p. 232, Aldine edition.

[24] See end of Fabian's Chronicle, which he nameth the Concordance of Histories.

tortured into implicating others, probably falsely, was sentenced to death, but died in prison.[25] The few contemporary friends of liberty of conscience denounced this occurrence, but at present some professed friends of freedom endorse principles which, carried to their logical conclusion, justify this outrage. The danger and the outrage of such matters lie in admitting the existence of a power to punish mere psychologic offences, and not in the mere manner of its exercise.

If under obscenity laws we may punish the expression, or promotion in others, of an undesirable state of mind, why not punish the existence of such an undesirable state of mind even before verbal expression? Why wait until the harm of publicity is achieved? Then why not establish inquisitions to discover the existence of such undesirable states of mind and punish them? If it be a crime to disseminate "obscene" literature, because of its alleged tendency to stimulate lewd thoughts and lascivious feelings, and the imaginary danger of these, then we should also penalize the possession of lewd thoughts and lascivious feeling. Are our moralists for revenue and their "liberal" abettors willing to carry their doctrine to this logical conclusion, and to establish inquisitions, not only as against "obscene" books, but "obscene" minds, and to prescribe and enforce a penalty for every lewd thought or lascivious feeling entertained by themselves?

We already compel immigrants to disclose their mental condition, and if they have that undesirable state of mind known as non-resistant Anarchism we punish them, by denying them admittance to the United States. If we admit the existence of a power to punish any mere state of mind, any mere psychologic offense, entirely separate from any actual injury to any one, then it becomes a mere matter of

[25] Lord Campbell's Life of Bacon, Vol. 3, pp. 62-66; Erskine's Speeches, Vol. 1, p. 254. But see also Dixon's Personal History of Lord Bacon, pp. 224 to 240.

legislative discretion to determine what states of mind shall be punishable, and a mere matter of judicial speculation how the existence of the prohibited state of mind shall be discovered, or proven. I cannot agree with these radical friends that such a power either ought to be, or is vested in any body of American legislators. In this matter I prefer to stand with those eminent and conservative gentlemen whom I shall now quote in support of my own contention. These are some of the conservative friends of *unabridged* freedom of utterance as a matter of acknowledged natural right.

LORD MACAULAY.

"The true distinction [between persecution and punishment] is perfectly obvious. To punish a man because he has committed a crime, or is believed, though unjustly, to have committed a crime is not persecution. To punish a man because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrines with him, that he will commit a crime, is persecution; and is, in every case, foolish and wicked. * * *

"Let it pass, however, that every Catholic in the kingdom thought that Elizabeth might be lawfully murdered. Still the old maxim, that what is the the business of everybody is the business of nobody, is particularly likely to hold good in a case in which a cruel death is the almost inevitable consequence of making any attempt."[26]

"It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions and in fact no person is such a fool as to reason thus, except when he wants a pretext for persecuting his neighbors. * * * It was in this way that our ancestors reasoned, and that some people in our own time still reason about the Catholics. A Papist believes himself bound to obey the pope. The pope has issued a bull deposing Queen Elizabeth. There-

[26] Macaulay's "Hallam's Constitutional History."

fore, every Papist is a traitor. Therefore every Papist ought to be hanged, drawn, and quartered. To this logic we owe some of the most hateful laws that ever disgraced our history. Surely the answer lies on the surface. The church of Rome may have commanded them to do many things which they have never done. She enjoins her priests to observe strict purity. You are always taunting them with their licentiousness. * * * When we know that many of these people do not care enough for their religion to go without beef on a Friday for it, why should we think that they will run the risk of being racked and hanged for it?"[27]

A. J. WILLARD.

"The most general office of speech is to reproduce the thoughts and feelings of one in others. In this sense the liberty of speech is absolute, according to *the principles of the law.* It is impossible to conceive of an actionable wrong existing solely on the ground that one has attempted to impart his thoughts and feelings to another, unless some public law affords such remedy, or *unless such speech is accompanied by some action that is an aggression on the rights of another.* * * *

"It [speech] is a means of combining and constituting the common or mutual action of individuals, and, therefore, must be examined as among the means of performing such actions as depend upon cooperation. It would follow that, when an action is unlawful, speech used as a means to such end would partake of that unlawful character. This results from the fact that what is said, as well as what is done, may form a part of a transaction, and thus the lawful or unlawful character imputed to such transaction must affect all the elements of that transaction. Speech in this way may be part of the means of connecting the action of rioters or conspirators against governments. It may even point the nature and tendency of the actions which it accompanies, and

[27] Macaulay's "Civil Disabilities of the Jews."

thus become a means of conferring upon them the legal character of lawfulness or unlawfulness. * * *

"In all these cases, even where the character of what is spoken determines the legal character of what is done, *it is the act alone that can convert the mere use of words into violations of right.* Again, speech may be used for purposes of deception, and in that case, as in the cases previously mentioned, *the act of wrong is not consummated by the speech alone, but by the action produced by the speech.*

"In the instance of slander, words uttered may be attended by consequences rendering them injurious to the right of character. *In these cases the wrong consits in what is actually or presumably done by individuals, by society at large, or by the community, as a consequence of words spoken;* the words in such a case being the cause of injurious consequences, are regarded as in themselves injurious."[28]

SIR LESLIE STEPHEN

"The doctrine of toleration requires a positive as well as a negative statement. It is not only wrong to burn a man on account of his creed, but it is right to encourage the open avowal and defense of every opinion sincerely maintained. Every man who says frankly and fully what he thinks, is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions. * * * Toleration, in fact, as I have understood it, is a necessary correlative to a respect for truthfulness. So far as we can lay it down as an absolute principle that every man should be thoroughly trustworthy and therefore truthful, we are bound to respect every manifestation of truthfulness. * * *

"A man must not be punished for openly avowing any principles whatever. * * * Toleration implies that a man is to be allowed to profess and maintain any principles that he pleases; not that he should be allowed in all cases to act upon his principles,

[28] "The Law of Personal Rights," pp. 349-351 by Willard. (Italics are mine. T. S.)

especially to act upon them to the injury of others. No limitation whatever need be put upon this principle in the case supposed. I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible, of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons are so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons."[29]

I will quote another who, though not to be classified as a conservative, was yet conservative enough to be elected to the English Parliament. In America he would have been denounced as an "undesirable citizen" and treated as an object of suspicion.

AUBERON HERBERT.

"Of all the miserable, unprofitable, inglorious wars in the world [the worst] is the war against words. Let men say just what they like. Let them propose to cut every throat and burn every house—if so they like it. We have nothing to do with a man's words or a man's thoughts, except to put against them better words or better thoughts, and so to win in the great moral and intellectual duel that is always going on, and on which all progress depends."[30]

[29] Sir Leslie Stephen, on "The Suppression of Poisonous Opinions," published in *The Nineteenth Century*, March and April, 1883. (If memory serves me right, Leslie Stephen was educated as a clergyman, but became an Agnostic, and was knighted after this utterance. But as to these matters I may be wrong. T. S.)

[30] Auberon Herbert, *Westminster Gazette*, Nov. 22, 1893.

I think I have made it plain that there are scientists and other thoughtful persons who believe in freedom of utterance as an unabridgable right, while some professing radicals believe in it only as an abridgable liberty—by permission. In this respect I am quite willing to be classed with these conservative non-liberals.[21]

[21] For a more elaborate defense of my views on the precise point here involved see "The Historical Interpretation of Unabridged Freedom of Speech," in *Central Law Journal*, through March, 1910. This essay has been printed in pamphlet by the Free Speech League. It also constitutes chapter XI of "Obscene Literature and Constitutional Law."

VII

OUR PROGRESSIVE DESPOTISM

AS I view history, the evolution of organized government toward liberty, especially in its relation to laws which are penal in character, is clearly divided into three general classes of tendency. The first of these manifests itself in the effort to restrain autocratic sovereigns and their minions in the arbitrariness of their power to punish, by subjecting their wills and penalties to the authority of prior known rules or laws. The second step in this evolution toward liberty is to curtail the authority of the law-making power as to the manner of its exercise, so that it may not, even under the forms of law, violate that natural justice which requires uniformity of the law in its application to all those who in the nature of things are similarly situated, which uniformity, of course, is impossible unless the law is certain in the definition of what is prohibited. The third tendency is marked by the curtailment of the legislative power as to subject matter of its control, so as to conserve a larger human liberty by excluding certain conduct —and progressively an increasing quantum thereof —from all possible governmental regulation, even by general, uniform, and certain laws. This should later limit legislation to the prohibition of only such conduct as in the nature of things necessarily, immediately and directly involves an invasion of the liberty of another, to his material and ascertainable injury. I have no doubt it was such a government, of limited power to regulate human affairs, that the framers of American constitutions intended to establish.

The first stage of the evolution above indicated we generally term a lawless government of men, in contradistinction to a government by men according to law, and such a government is always despotic and arbitrary, although it may at times be a relatively benevolent despotism. The second stage means a government by men according to prior established rules, which rules may be as invasive and unjust as the legislative power sees fit to make them. This condition is aptly described as tyranny by the law, of which we find many examples all around us. The third stage wherein the legislative power is limited to the suppression of acts which are necessarily, directly and immediately invasive, is aptly termed liberty under law. Our present stage of evolution, so far as the leaders of libertarian thought are concerned, is probably to be located near the beginnings of this third stage, and in the course of a few thousands of years we may attain to something approximating real liberty under the law; and in another million of years we may attain to the anarchist's ideal, which is liberty without state-enforced law, made possible because no one has the inclination to invade his neighbor, and all are agreed as to what constitutes an invasion. The great mass of Americans, and humans generally, are now in that stage of their development which compels a love of tyranny under the forms of law, a tyranny tempered only by the discretion of the ignorant, such as know nothing of liberty in the sense of an acknowledged claim of right to remain exempt from invasive authority.

The transition from absolutism to government by law, in its earlier stages is marked by the misleading seemings of law, which, however, are devoid of all its essence. This is illustrated in many of the mis-called laws of the Russian Tsar, and also in the Chinese code, which latter prescribes penalties for all those who shall be found guilty of "improper conduct," without supplying any further criterion or test of guilt. Manifestly under such authority the magis-

trates are authorized to punish anything which whim, caprice, or malice might prompt them to adjudge "improper." Accordingly, we have a state of affairs wherein, under the misleading appearances of law, everything is condemned, and the arbitrary will of the officers of the State again create the criteria of guilt and determine the penalty, instead of merely enforcing "the law" as they find it. Thus, while observing the outward forms and seemings of law, the people are still governed by the mere despotic wills of officials.

The Supreme Court of the United States has put its seal of condemnation upon such tyranny, in the following words: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative part of the government."[1]

In our postal laws is a statute penalizing the transmission by mail of *obscene, indecent* or *filthy* literature, art, etc. No standard of judgment by which to determine guilt is furnished in the statute, and, as with the Chinese code, anything is "improper conduct" which the arbitrary will of the magistrate may choose to include. So with us everything is "indecent" or "filthy" which through whim, caprice, malice, or sex-superstition may tempt the judge to a vengeful ire, or which the Postmaster-general may elect to exclude from the mail. That particular phase of despotic power is so old, and the average "intelligent" American slave has become so accustomed to it, that the very arbitrariness of this power is accepted as part of his conception of "liberty."

However, a new scope has been added to this tyranny. As a part of the same statute against "obscenity", it is provided that, "every article or thing designed or intended for the prevention of conception

[1] U. S. vs. Reese, 92 U. S. 221.

or procuring of abortion *and every article or thing intended or adapted for any indecent or immoral use,"* and any information sent through the mail telling where any of these may be had, shall be punished.

Repeated futile efforts have been made to induce the courts to construe "indecent" so as include irreligious literature. An effort is now on foot to make blasphemy unmailable by express statute. Some State statutes have been amended so as to include "filthy or disgusting" books, etc., under the ban. By recent amendment our postal laws also interdict "filthy" communications, without informing us by what criteria ideas are to be adjudged "filthy." Again, in the case of Vanni, the effort was made to have the court punish blasphemy as "filthy." Again the effort failed, the court holding that these statutory words must be construed together, and thus construed all imply a sexual significance. So also, the statutory words *"every article or thing* intended or adapted for any indecent or immoral use," must be applied only to immorality of the same general class as "obscenity."

Early in 1908 the postmaster at Paterson, N.J., held up the anarchist paper *La Questione Sociale* pending instructions from Washington as to its exclusion. President Roosevelt ordered the paper excluded from the mails and, under date April 9th, 1908, sent a message to Congress asking for more legislation on the subject and appending the official opinion of Mr. Bonaparte, his Attorney-general, on the legality of what Mr. Roosevelt had done in relation to *La Questione Sociale.*

In this opinion the Attorney-general says: "I cannot advise you that the section above quoted authorizes either the prosecution of the persons mailing the paper in question, or its exclusion from the mails." After much argument to justify his reluctance at coming to such a conclusion Mr. Bonaparte adds this: "There is another aspect of the question. To determine whether those responsible for such a publication

have legal right to their transportation in the mail, it may be material to determine whether they would have any adequate remedy if refused such transportation." This question the Attorney-general answers in the negative and of course it was possible to cite judicial precedent [2] as can always be done in support of every tyranny.

So then, simply because of his confidence that courts would refuse to give any relief, he concludes that lawful power exists, but without lawful authority. After having said: "I cannot advise you that the section above quoted [the only statute at all related to the subject] authorizes either the prosecution of the persons mailing the paper in question or its exclusion from the mails," the Attorney-general adds: "While therefore in the absence of any express provision of law or binding adjudication on this precise point, the question is certainly one of doubt and difficulty, I advise you that, in my opinion, the *postmaster will be justified in excluding from the mails any issue of any periodicals*, otherwise entitled to the privilege of second class mail matter, *which shall contain any article constituting a seditious libel* and counselling such crimes as murder, arson, riot, and treason."

Of course, in determining what constitutes "seditious libel" one would be compelled to go back to the old pre-revolutionary English cases. Under the criteria of seditious libel thus established, with all their uncertainty to invite a lawless discretion on the part of the Postmaster-general, some issue of every "Progressive" journal in America probably could be excluded from the mails.

Mr. Roosevelt thereupon sent one of his characteristic messages to the Congress. Upon the opinion of the Attorney-general, which had said that no express provision of law or binding adjudication upon the precise point existed, Mr. Roosevelt stated that "Under this opinion I hold that existing *statutes give the*

[2] Commerford v. Thompson, 1 Fed. Rep. 422.

[3] Senate Document No. 426, Sixtieth Congress, First Session.

President the power to prohibit the Postmaster-general from being used as an instrument in the commission of crime," including verbal or constructive "treason." Of course he is only characterizing the transmission by mail of anarchist literature. Although he says existing "statutes" give him the power, he demands further legislation and he secured a part of it. His message concludes with these excited words. "The anarchist is the enemy of humanity, the enemy of all mankind, and his is a deeper degree of criminality than any other. * * * No paper here or abroad should be permitted circulation in this country if it propagates anarchistic opinons."

Those who may care to measure the intelligence of Mr. Roosevelt's conception of our constitutional guarantee for freedom of the press, should apply his recommendation to the *Hibbert Journal,* for July, 1910, wherein is contained a very illuminating article on "The Message of Anarchy" by Jethro Brown, Professor of Law in the University of Adelaide.[4] Had Mr. Roosevelt's recommendation been adopted by Congress, not only would the eminently respectable and conservative *Hibbert Journal* have been suppressed, but under the common-law rule as to seditious libel, many papers printing Mr. Roosevelt's later speeches could also be excluded from the mails. Mr. Roosevelt probably knows what he wants when he demands that all be excluded from the mails, which at common-law was designated as "seditious libel." For those who are less intelligent about seditious libel than Mr. Roosevelt and Mr. Bonaparte, let me quote a reminder or two to show what ideas were punishable under the common-law, so we may know what ideas Mr. Roosevelt wants power to suppress.

"If any man should not be called to account for possessing the people with *an ill opinion of government,* no government can subsist. *Nothing can be worse to any government than to endeavor to procure*

[4] This fine statement of the anarchist's case is republished by The Hillacre Book House, Riverside, Conn. for 25c.

animosities as to the management of it. This has been always looked upon as a crime, and no government can be safe unless it be punished." Again: "It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by *bringing the government into disesteem,* whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the Law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another." [5]

"And here he [Holt] adduces several precedents of persons indicted and executed for words held to be treasonable; one of them during the reign of Henry the Sixth, and three in the reign of Edward the Fourth, about as reasonable and just as that of the innkeeper, who was executed during the same reign, for saying jestingly, that he would make his own son heir to the Crown; or as that of the gentleman whose favorite buck the king had killed, and who was also executed in the same reign, for wishing it, horns and all, not in the king's belly, but in the belly of those who had counselled the king to kill it." [6] This is the despotic rule which Mr. Roosevelt, by the message quoted, says he desires to restore to these United States.

It is most extraordinary, in our country, where a few people still profess to believe in liberty, that this Rooseveltian usurpation of censorial power, and his demand for its enlargement, did not provoke a single conspicuous rebuke from any important person. We have forgotten, or what is nearer correct, even among the most intelligent ones, few ever knew this: "Well therefore and in the highest spirit of philosophy, did Montesquieu say that the Roman Republic was overthrown, not as is commonly supposed by the ambition

[5] Per Lord Ellenborough, R. v Cobbet, reported in Holt on Libels A. D. 1804. Reproduced from The Law of Libel, by Mence, 1824, pp. 193 to 194.

[6] Reproduced from "The Law of Libel" by Richard Mence, 1824, p. 173.

of Ceasar and Pompey, *but by that state of things which made the success of their ambitions possible.*" The people of this "Republic" are now in a state of indifference and ignorance concerning liberty, such as invites an overthrow and abandonment of all that remains of liberty and democracy, to wit, its forms and pretenses.

But some will say: "There still remain those 'bulwarks of liberty,' the courts!" Why not appeal to the courts to uphold the constitutional guarantees, and thus their own reputation? But is it really worth while? Have we any reason to believe them to possess any more enlightened view of constitutional liberty than a clerk under the Postmaster-general? Cite the precedents already established, you say? But why? Do the precedents promote liberty? Even if they did would they be followed in a case presenting emotional difficulties to "his honor"? When deeply moved with the *awful word "Anarchism"* right before them could the judges possibly see the application of libertarian precedents? Appeal to the Constitution, which in their official oath they swore to uphold? But why? I ask again! Will not the judges be emotionally so disturbed as quite to dethrone their reason, when a real live anarchist is at the bar of "Justice"? I wish I could believe it were not so. Maybe they could still avoid "knowing because they feel, and being firmly convinced because strongly agitated." I am no prophet; I cannot tell, but I do remember that Alexander Hamilton argued that it was useless to place a guarantee of freedom of the press in our Constitutions, because, as he said: "Who can give it a definition which would not leave the utmost latitude for invasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declaration may be inserted in any constitution respecting it, must altogether depend on public opinion and on the general spirit of the people, and of the government." [7] I fear that as to the last proposition

[7] The Federalist p. 536, Ed. 1818.

he is right because our judicial history abundantly shows that courts have destroyed and evaded the constitutional guarantee of freedom of speech and of the press,[8] and how hopeless it is to expect it to be otherwise especially in the face of many evidences pointing to such intellectual bankruptcy of our courts and judges, as incapacitates them for critical thinking in the face of an epidemic of respectable hysteria infecting the judges themselves.

The road and fate of despotism are ever the same. With "the best of motives" and general acquiescence, there come gradual accretions of power, by small usurpations on the part of those entrusted with authority, and thus the masses become habituated to slavish submission and the authorities to the enforcement of lawless power, thus paving the road to an enshrined tyranny. Because we fail to see the potency of seemingly insignificant precedents of evil import, no single encroachment upon liberty, considered alone, ever seems worthy of great effort to destroy. Ultimately the established precedents justify the greater invasions and the aggregate of these tyrannies becomes unbearable. Then comes the revolution by violence; a partial abrogation of tyranny; a change in method of selecting the tyrant, and the same eternal round is re-enacted. America is travelling fast toward the ultimate despotism and its violent overthrow. Shall we continue to travel in this road? It is not too late to retrace our steps toward liberty and justice through light. Unfortunately, there is no one at present in evidence who combines adequate foresight, political influence, and the moral courage successfully to lead the way to an enlarged and an enlightened individualism, with freedom of speech and of the press as its foundation. Let us hope that such a person will appear and when he appears let us be zealous to give him support.

[8] "Obscene" Literature and Constitutional Law, chapter 10 on "The Judicial Dogmatism on Freedom of the Press."

VIII

METHODS OF CONSTITUTIONAL CONSTRUCTION

The mental operations by which our constitutional liberties receive "construction" are naturally classified into three distinct categories, viz: the analytic, the historic and the synthetic processes. As applied to constitutional law, these three categories embody the essentials of the scientific method and it is of the highest importance to the progress of juridical science that lawyers and judges acquire a clearer idea of its requirements.

From a time long antecedent to that in which Englishmen executed forty judges for their unrighteous judgments, lawyers and courts have been objects of suspicion and contempt in minds uninfluenced by the sophistry of our legalolatrists. My conviction is firm that our laws and courts will continue to receive such disrespect until there is a better understanding of both the cause and the cure of the malady. The purpose of this paper is to point these out.

Psychologists inform us that all reasoning is but an attempt to justify our predispositions. Space limits here preclude a psychogenetic study of predispositions. It is enough to say that judges are not free from them nor is society exempt from their evil influence. I think I may safely add that the predominating judicial predisposition is never a singleness of devotion to clearly-conceived requirements of the scientific method. As sympathy or interest inclines them toward the aspirations of the masses or the pretensions of the mighty, judges are necessarily pre-

disposed in favor of either a government from out of the people or a government from over the people. Thus lawyers and judges become definitely arrayed in two groups of conflicting predispositions—the liberal and the strict constructionists. The more intelligent will be conscious of their status and more or less consistent in their adherence to the standards of their group and will be most plausible in defending their predispositions. They will, indeed, do almost anything except make a thorough introspection as to the source or nature of these predisposing influences or definitely adopt the scientific method for checking them.

Despite an ostentatious display of the "judicial temperament" the legal scientist sees plainly the nature of the predisposition in the conspicuous absence of the factors by which well disciplined minds consciously impose upon themselves the check of the scientific method. In the hope of increasing both the inclination and the capacity for using the scientific method I will proceed to elucidate it and illustrate its use. Perhaps I should remind the reader that the first requisite to the scientific method is confidence in its results, no matter how these may conflict with our desires or interests.

THE ANALYTIC METHOD OUTLINED

The analytic method is based upon the assumption that the constitution declares general principles or that in its guarantees of liberty it implies general criteria of liberty which are to operate as a controlling restraint upon the conduct of all public functionaries. Hence the object of the analytic method is to ascertain from the actual wording of the constitution and by a strictly deductive process, the exact meaning and application of its implicit or explicit general principles upon any particular piece of legislation or specific official act. If we are not to encourage judicial lawlessness, this means that the criteria of constitutionality must be both general and certain

and, for the purpose of the analytic method, must be derived exclusively from the very words of the constitution and not dogmatically forced into it. This is a distinction which some courts have declared to exist,[1] but heretofore the proper implication of the distinction between reading from and reading into the constitution has usually been ignored in the judicial cerebrations. Furthermore, failing to understand and apply the scientific method, our judges also fail to check their unreasoned emotional predispositions and so have practically reduced our constitutional liberty to a matter of mere uncontrolled judicial whim. The intelligent observer sees in their dogmatic reference to the constitution nothing more than a transparent pretext to justify the judicial prejudice. Elsewhere I think I have demonstrated this to be a fact with reference to our constitutional guarantee of unabridged "freedom of speech and press."[2] This situation is equally apparent upon other subjects and is shown by the judicial opinions which devote themselves to a discussion of what the judge thinks the constitution ought to be rather than what its framers meant to make it.

These defects in intellectual process are equally apparent and quite as uniformly present whether the immediate effect is to uphold or to deny a particular right claimed. It is an intellectual shortcoming not called into existence by the necessities of either the liberal or the strict constructionist, as such, but arising from the inadequate intellectual development of our judges. Under such circumstances, even when a claim of liberty is sustained by judicial dogmatism nothing whatever has been gained for general liberty.

So far as constitutional law is concerned, dogmatic liberty is liberty by permission, a mere phase of slavery, because the next judicial dogmatist,

[1] State vs. Payne, 29 Pac. Rep. 787; McCluskey vs. Cromwell, 11 N.Y. (1 Kern.) 593-602.

[2] "Obscene" Literature and Constitutional Law, Chap. 10, entitled "Judicial Dogmatism on Freedom of the Press."

through a like exercise of arbitrary power, has equal authority for the contrary conclusion. The casual suspense of despotism is not a destruction of despotic principles or power. The former depends on the virtue or caprice of tyrants, political, economic, judicial. The latter depends upon the intelligence and force at the command of the governed. Judicial "discretion" is not inherently different from judicial caprice. Government by a judiciary unrestrained by clear and unequivocal general principles, is in fact a lawless government; its activities embody every evil element of despotism acting *against law*. All liberty by permission is despotism no matter how well the formalities of law and democracy seem to be observed, nor how well we are trained to humble prostration of intellect before the idol-precedents established by our legalolatrists.

THE HISTORICAL METHOD OUTLINED

When it seems to justify some predisposition, our courts say that the "constitution should be read in the light of its history and of the understanding of the whole American people when the grant was made."[3] This shows that the judges realize *some* connection between historical events and constitutional construction, but the use they make of this knowledge only betrays the crudity of their notions as to the nature of that relation. In the first place, it is absurd to talk of a consensus of opinion among the "whole American people." The American people as a whole had but few and crude ideas about problems of liberty and the leaders were frankly divided in their opinion upon the province of government as well as upon the guarantees for protecting liberty which should be incorporated into the constitution. Of course, in the language used each contestant hoped that future generations would see his own predisposi-

[3] Gibbons vs. Ogden, 9 Wheat 1; 6 Law Ed. 1; see also Scott vs. Sanford, 19 Howard, 393, 15 Law Ed. 691. Reynolds vs. U.S., 98 U.S., 162; Boyd vs. U.S., 116 U.S., 616-629-635; Carolina vs. U.S., 199 U.S., 437.

tions, although sometimes necessity for compromise may have made the language designedly vague. At all events, it is manifestly ridiculous to talk about "the whole American people" at that time as having the same opinion about constitutional liberty. A clearer conception of the historical method as applied to constitutional construction would have compelled the courts to see that some of its provisions represent a compromise between conflicting theories of government and liberty, though usually they represent a decisive victory of one of the contesting factions.

Rightly to understand the historical methods means to enquire into those issues of principle which were the essence of the antecedent agitation, which conflicts our constitutions were designed to decide. The fact that this method of contrasting pre-revolutionary contentions as a means of constitutional interpretation has never been judicially used, shows the want of understanding by which our courts are habitually hampered.

Such defective conception as to method makes it easy for our courts to refer to history and quote some historic opinion as a precedent to justify whatever predisposition is controlling the momentary whim of the judicial mind. When a court wishes to justify a cherished preconception in one case, it may quote approvingly Jefferson's resolution on toleration passed by the Virginia Legislature.[4] In another case, when the same court wishes to abridge freedom of utterance, it will unhesitatingly repudiate the above by approving Blackstone's contrary conception of toleration.[5] Now they overlook the fact that there was great need to "uncannonize Blackstone" as Jefferson wrote.[6] To those who know no more

[4] Reynolds vs. U.S., 98 U.S., 163.

[5] Patterson vs. Colorado, 205 U.S., 454; 4 Bl. Com. 151. "Liberty of the press consists of printing without any previous license, subject to the consequences of the law." King vs. Withers, 3 Term Reports 430. This was the conception of liberty of the press which always obtained among tyrants after 1694, when the licensing act was repealed. It is this conception which our supreme court endorses.

[6] Letter 104 to Judge Taylor, June 17, 1817, edition of 1899.

about the scientific method than do such judges, and to those who have predispositions similar to those held by them, these two irreconcilable definitions of intellectual freedom will seem equally plausible and conclusive and the mind will remain utterly unconscious of the existence of any conflict.

THE SYNTHETIC METHOD OUTLINED

By the synthetic method of constitutional construction is meant the co-relation of all constitutional provisions which define and restrict governmental authority. The synthetic method is based upon the assumption that each of these limitations and guarantees is a part of a general idea of liberty and that only by understanding each part in its relation to all other parts may we arrive at an all-inclusive generalization thereafter to be applied deductively and decisively to each concrete problem of freedom and to each separate constitutional guarantee of a partial or particular liberty.

I believe that our courts without exception have utterly failed to show the least acquaintance with synthetization as a method of constitutional construction. Our judges are far removed from even a speaking acquaintance with the scientific method for developing a general concept of liberty. Consequently they lack the means of acquiring a practical working criterion for determining the constitutional limits between liberty and the police power with the result that they do much worse than merely dogmatize or to attempt some crude empiric inductions about it. The courts tell us that the limits of liberty and the police power have not been defined and are in their nature indefinable.[7] Thus our courts undertake authoritatively to make their own intellectual bankruptcy the limit of the intellectual evolution of the race. It is pathetic but apparently inevitable that

[7] In re License Cases, 46 U.S., 504-583-592; 12 Law Ed. 256. Comm. vs. Alger, 7 Cush, 53-85. Leavenworth vs. Miller, 7 Kas. R. 501; Reeves vs. Corning, 51 Fed. Rep. 774-785.

such men should so largely determine the destiny of human society in thus stifling the development of a rational conception of liberty. In concluding this essay I will indicate tentatively the criteria of the limits of liberty and the police power.

THE SCIENTIFIC METHOD PRACTICALLY ILLUSTRATED

Having now outlined the requirements of the scientific method, I shall illustrate somewhat briefly how this method may be applied in the interpretation of the free speech clause of the Federal Constitution.[8] I select this because it seems to me the more fundamental of our liberties and for the further reason that I can make this illustration more brief than I could any other by occasionally pointing to some published essay of mine for greater elaboration. I have tried to analyze the words of the first amendment[9] to show that freedom of utterance is abridged whenever a man is punished for the mere psychologic offence of expressing his thoughts, that is, whenever he is suppressed or punished except on the basis of an ascertained, actual and material injury or the imminent danger thereof according to the known laws of the physical universe. This standard would permit the fruitless advocacy of every disapproved doctrine even including treason. Especially because of the clearness of the constitutional language in this clause it has seemed to me that the results of the analytic process are conclusive, and yet they do not satisfy all the requirements of the scientific method.

While persisting in doubts founded upon conservative predispositions, the result thus attained may be checked by the historic method, as I have in-

[8] For an abstract statement of the scientific method see: *American Law Review*, June, 1908, reprinted in Chap. 18 of "Obscene" Literature and Constitutional Law. See also: Interstate Commerce, Employers' Liability and the Supreme Court, in *Government*, June, 1908.

[9] Vol. 68, *Central Law Journal*, pp. 227, 234,, Mch. 26, 1909; revised in Free Speech for Radicals, Chap. 4. Again in "Obscene" Literature and Constitutional Law, Chap. 8.

dicated. This I have also done elsewhere and I believe I have justified the conclusion already stated.[10] Perhaps there the issues were not as exhaustively treated as they might have been, yet the process is clearly enough illustrated. Especially important in this connection is the declaration of the Continental Congress (which I had not then seen) in which it is said that freedom of the press must be maintained as a means "whereby *oppressive officials are shamed and intimidated* into more honorable and just modes of conducting affairs."[11] Likewise, I then overlooked the fact that the United States Supreme Court had once endorsed as authoritative that fine statement of Jefferson's as embodied in Virginia's Act of Toleration, in which it is said that *"it is time enough for the rightful purpose of government for its officers to interfere when principles break out into overt acts against peace and good order.*[12] This criterion of the limits of toleration is applicable to every possible case of freedom of speech and press but it is hardly to be expected that the Supreme Court will adhere to it when in some future case it shall come into conflict with its preconceptions. Our courts are not yet controlled by principle, or only when in their narrower vision the expedience of particular results can be justified by principles.

There is another check, perhaps only a subdivision of the historic method, which can also be applied. The academic defences of intellectual freedom can be separated into two classes—those which only advocate more freedom than was contemporaneously conceded and those defences which are for an unabridged freedom of utterance. But even the former will confirm our result if we do not confuse the demand for larger liberty with that for unabridged freedom. If we ignore the dogmatic exceptions

[10] *Central Law Journal*, Mch. to June, 1910; "Obscene" Literature and Constitutional Law, Chap. 11.

[11] Address to the inhabitants of Quebec, Oct. 26, 1774; *Journal of Continental Congress*, Vol. 1, p. 106, edition of 1904.

[12] Reynolds vs. U.S., 98 U.S., 163.

which the various authors make, and generalize the reasons or the particular criteria of freedom offered in support of a partial or larger liberty, we will find even here the budding conceptions through which the idea of unabridged freedom of utterance must develop. The reasons urged and the criteria offered for unabridged intellectual liberty upon one subject are not fundamentally different from those which must be applied to secure toleration for every opinion on every subject. An author may regret or even repudiate the consequences, but it is nevertheless true that the arguments and criteria furnished to secure freedom of religious discussion are usually just as applicable to political or sex discussion and to the criticism of our courts and government. Thus all the arguments presented for a growing intellectual liberty[18] by exhibiting the living thoughts which determined the intention and action of the men who framed our constitution, lend us assistance towards finding general criteria for unabridged intellectual opportunity. This in turn becomes a factor in the criteria of general liberty. It is in this way that we can test our working hypothesis first derived by the use of the analytic method. It is only by this method that our judges will be able to check their own predispositions and lust for power.

It seems to me that even this brief outline of the historical method which is but a part of the required checks for a thorough method of constitutional construction is enough to show us how far short our courts have fallen even when they had some glimmer of the true process.

CONCERNING THE SYNTHETIC PROCESS

In illustrating what I mean by the synthetic method I believe I can show that our judges have not even dimly conceived either the possibilities or the process

[18] These are moderately well re-stated in Chap. 5 of "Obscene" Literature and Constitutional Law. For more elaborate original statements see Free Press Anthology.

by which alone the best intellectual results can be obtained. Thus far it has been briefly indicated how, by improving on the old methods, the conclusion may be justified that unabridged freedom of speech and press means that no one shall be hindered in or punished for expressing his sentiments about any subject so long as no actual or material injury has resulted, and even then no punishment shall follow from the sentiments as such, but shall be inflicted solely on the basis of proven actual and material injury. Because of the nature of the method hereinbefore used, the criteria of intellectual freedom were necessarily stated in general terms and without application to concrete problems or a consideration of the related guarantees of liberty. This will now be done. Although this synthetizing process is the least known to the legal profession, yet it is the most important check which can be applied for the confirmation or destruction of the criteria of freedom heretofore indicated.

THE FOURTEENTH AMENDMENT AND CERTAINTY

First, then, let us see what bearing the "due process of law" clause has upon the construction of the free speech clause. So far, apparently our courts have not even dreamed of any connection. In practically all prosecutions for circulating prohibited ideas, the test of criminality has been and is the problematic, speculative and prospective psychologic tendency of an accused idea upon some mere hypothetical reader of the future. Because of the uncertainty of this criterion of guilt, endless opportunity for oppression was offered to the evil-disposed members of spy-societies and of the judiciary. Every one familiar with this chapter of the struggle for freedom against the varying methods for constructing treasons, knows how frequent were the complaints against uncertainty in the criteria of guilt. In the stormy days of George III declamatory patriots

used to describe this judge-made law of treason somewhat in the way that Johnson defines network, as "a thing reticulated or decussated, with interstices between the intersections."

But uncertainty in the criteria of guilt was also the cause for complaint as to other than intellectual crimes, and from the necessity for a remedy against all the evils of uncertainty, arose the maxim, *ubi jus incertum ibi jus nullum.* About a century ago, Mence, in his valuable book on "Libel," while writing about the words *"per legem terrae,"* said: "Whatever else it may or may not mean, in this place there can be no doubt but that it must mean the then known, accustomed and established law of the land, *so opposed to any uncertain and unknown rule.*"[14] Such contentions would usually be connected with Coke's statement that all judgments against Magna Charta are void.[15]

Elsewhere I have quite exhaustively discussed uncertainty in criteria of guilt as violative of the guarantees of "due process of law"[16] and yet I cannot refrain from giving some additional references to books where some phase of the subject is mentioned.[17] There cannot be "due process of law" unless there is "law." In any case where all the facts are known there can be no "law" unless the criteria of guilt are so certain that men of ordinary intelligence cannot err nor reach conflicting conclusions as to their criminality. If this conception of law and due process of law is now co-ordinated with our guarantee of una-

[14] Mence on Libel, p. 312.

[15] 2 Coke's Institutes, 527, 77, 87.

[16] "Obscene" Literature and Constitutional Law, Chaps. 18 to 21.

[17] Lord Camden, quoted in Words and Phrases, vol. 3, p. 2069; Lord Andover in a speech in 1640, quoted in the Freedom of Speech and Writing, p. 94; Fortesque's Preface to his Report, pp. 3-4; John Locke, quoted in Observations on the Nature of Civil Liberty, pp. 37-8; John Cartwright, in the English Constitution Produced, etc., pp. 136-7, 143, 276; Rev. C. C. Colton, in "Lacon," p. 83. Ed. of 1832; "The First American Democrat;" Blackstone's Com., Book III, Chap. 8; Sir Thomas Burdette to his constituents (1810) p. 15; 4 Parliamentary History, 115, 117, 118; U.S. vs. Lamkin, 73 Fed. Rep. 463; Justice Brown of U.S. Supreme Court, 34 Am. Law Review, 322.

bridged liberty of utterance, then we must conclude that no form of speech (including printing) can be penalized merely on the basis of a jury speculation about the prospective psychological tendency of the idea upon a hypothetical future reader. In other words, if we construe freedom of speech as a subdivision of that general liberty which, in order to preclude all arbitrary power, in all cases requires absolute certainty in the criteria of guilt, then we again conclude that such freedom of speech and press is abridged if any mere psychological offence is punished. As was said before, the criteria of guilt must include actual and material injury resulting from the dissemination of an idea. Guilt can never be constitutionally predicated upon an uncertain speculation about the uncertain and problematic tendency of an idea upon a future hypothetical reader and actor.

DUE PROCESS OF LAW AND EQUALITY

The one essence of "law" and "due process of law" which has most often received judicial sanction is the proposition that there can be no "law" without equality as to all persons who are similarly situated with reference to the state or society. Thus Jeremy Bentham made equality one of the tests for determining the existence of freedom of utterance in relation to government. According to him, liberty exists if "at the hands of persons exercising the powers of government a man shall have no more to fear from speaking and writing against them, than from speaking and writing for them."[18] At about this same time James Mill also wrote his celebrated essay on "Liberty of the Press" and in the pages devoted to a discussion of equality of intellectual opportunity, he said: "Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may

[18] The Liberty of the Press, (1821) pp. 28 to 55.

think proper to employ. If any obstruction is given to one sort of opinions, not given to the delivering of another; if any advantage is attached to one sort of opinions, not attached to the delivery of another, so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing. To attach advantage to the delivering of one set of opinions, disadvantage to the delivering of another, is to make a choice."[19] It should be added that this equality must be maintained even as between subjects that are unrelated, as mathematics and religion. Freedom is as much abridged if we suppress *all* opinions upon a given subject as when we suppress the the disapproved opinion in relation thereto. This brings us to a special application of Herbert Spencer's formula of freedom which is that it consists in the greatest liberty consistent with an equality of liberty. I wish to digress from the discussion to note that Spencer's formula does not permit of application to cases wherein it becomes necessary to balance mere psychic factors against the material things of life, because in such a case there is no common yardstick by which equality can be measured.

In the absence of actual and material injury, if we punish the publication of falsehood about any particular subject, then we must punish all falsehood pertaining thereto. This, however, can have no application to cases wherein the truth or falsity of a statement is purely speculative or transcendental so that the exact sciences do not yet furnish inerrant standards. The rule of equality is denied whenever we penalize unmerited praise of any given institution without also penalizing the unmerited blame, and vice versa. Likewise, the rule of equality is vio-

[19] On Liberty of the Press, by James Mill in supplement to sixth edition of Ency. Britannica, 1821; reprinted by the Free Speech League, 1912, with introduction by Theodore Schroeder, see p. 97. See also appendix hereto.

lated if we permit impassioned praise without permitting equally impassioned denunciation of government or its officials, etc., etc.

Construing together this aspect of "due process of law" and the free speech provisions of our constitution again we must conclude that freedom of speech is abridged whenever the greatest equal intellectual opportunity or right is not maintained. We must have even an equal right to be wrong. In other words, the just or unjust praise, merely as such, or the passionate or dispassionate denunciation of public officials, laws, governments or revolutions, cannot be penalized without violating the equality guaranteed by our Constitutions. Since in these respects the maintenance of equality has never been possible under any kind of censorship, therefore no statute whatever of this character and upon this subject can be passed without violating the Constitution.

THE SIXTH AMENDMENT

We may now proceed to relate our interpretation of freedom of speech to that provision of the Constitution which guarantees that persons accused of crime "shall be informed of the nature and cause of the accusation." This means that the accused must be informed not only of the facts claimed to have offended, but also the law, the criteria of guilt, by which those facts must be adjudged criminal. In other words, he must be "informed by the law as well as by the complaint what acts or conduct are prohibited and made punishable." "In a criminal statute, the elements constituting an offence must be so clearly stated and defined as to reasonably admit of but one construction. The dividing line between what is lawful and unlawful cannot be left to conjecture."[20]

Therefore if we interpret the free speech guarantee in relation to the Sixth Amendment to the Fed-

[20] U.S. vs. Capital Traction Co., 34 App. Cases, D.C., 592. Czarra vs. Medical Supers., 25 App. Cases, D.C., 448, and cases cited.

eral Constitution, we arrive at the same conclusion as when we connected it with the Fourteenth Amendment, namely: no spread of ideas can be penalized by making the criteria of guilt a mere speculation about an unrealized psychologic tendency. Indeed, the meaning and almost the identical words might be used here which were used in the corresponding occasion herein-above, in stating the argument or conclusion against uncertainty implied in "due process of law."

EX POST FACTO LAWS AND FREE SPEECH

Clearly related to this problem of the uncertainty in the criteria of guilt—where guilt depends upon the psychologic tendency—is the evil of *ex post facto* legislation. When tyrants made no pretence to decency there was no hesitancy about passing laws after the fact to punish some "undesirable citizen" whose conduct did not come within the letter of any existing prohibition. At present one might almost suspect that new methods had been cunningly devised to accomplish the same result without frankly affirming the propriety of creating criteria of guilt *ex post facto*. If legislatures are prohibited from directly enacting *ex post facto* laws they cannot be allowed to accomplish the same end indirectly, merely by the device of leaving uncertain the criteria of guilt and thus delegating to the courts a seeming authority for creating *ex post facto* standards of judgment at the trial of the accused. The abuses by *ex post facto* criteria of guilt were always most conspicuously manifested in cases of political offenders including such as were accused of seditious libel.

Thus an act of 25 Edward III provided that "if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the King and his Parliament whether it ought

to be judged treason or other felony."[21] This much praised legislation was evidently designed to take from the courts the power to create *ex post facto* criteria of guilt and vest that solely in king and parliament. The American constitutions intended to destroy that authority even as to the legislative body. Unquestionably the idea was to destroy the last possibility of punishing according to *ex post facto* standards of guilt. What congress cannot do directly it cannot do indirectly by handing back to courts the pernicious power which had already been taken from them. The purpose of this guarantee of liberty was to destroy forever the evil of such tyrannous authority, and not merely to take it from the legislative branch in order to place it with the judiciary. Lord Holt, in writing of seditious libel, said that the offence was necessarily left as uncircumscribed as the natural possibility of the injury. "The enactment of the law [in cases of libel] is contained in the punishment of the offence."[22] That is precisely the evil which by the prohibition against *ex post facto* legislation, it was sought to avoid.

Now then, by co-relating this with our free speech provision we again come to the conclusion that unabridged freedom of speech and of the press means impunity in the expression of every idea, as such, and freedom from punishment under any test of the psychologic tendency of the offending article. Consequently liberty of utterance is abridged if punishment follows upon any other condition than that of a proven actual and material injury.

TREASON AND FREE SPEECH

Again I remind the reader that we are not to be frightened away from the synthetic method merely because its results conflict with our emotional predispositions. The necessity for checking our feel-

[21] English Liberties, p. 64.

[22] Holt on the Law of Libel, p. 37, edition 1816. For further discussion of *ex post facto* legislation in this connection, see: "Obscene" Literature and Constitutional Law, Chap. 23.

ings makes this method indispensable for all who aspire to reach conclusions dispassionately.

There are some other provisions of the Federal Constitution which have a very direct relation to the free speech clause. The two I now have in mind are also very intimately related to one another so that it is almost necessary that they be considered together. I refer to the provision that "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies and giving them comfort." Mere preparation, such as might be useful in war or in resistance to government, but not followed by actual hostilities, is not treason, and to make this still more certain we have the second amendment which reads: "A well regulated militia being necessary to the security of a free state, the right of the people to bear arms shall not be infringed."

I believe that these provisions have the most vital bearing of any part of the Constitution upon the problem of determining the meaning of free speech. Even though this language is plain, its obvious meaning has often been ignored by the courts. The obvious meaning can be reinforced here only by a mere outline of the historical method of interpreting these two constitutional clauses. This will also bring into plain relief the interpretation which it forces upon the guarantee for unabridged free speech.

To begin with, let us look a little into the history of the struggle over constructive treasons and we at once get a new light on the constitutional definition of treason.

The statute of 25 Edward IV was considered a great improvement upon the prior laws of treason because some effort was made toward defining the crime and to that extent it provided a check upon the lawlessness of the judiciary. For even this little relief, this was called the *"benedictum parliamentum."* However, this statute made express provi-

sion for punishing mental treason in whomsoever "doth compass or imagine the death of our Lord the King or our lady the Queen, or of their eldest son and heir."

This reminds us that in the beginning all the abridgments of freedom of utterance were designed solely for protecting the aristocrats in the fruits of legalized injustice and vested wrongs. It would seem that this chief reason for a censorship having disappeared, the censorship itself should go under, but it does not. We have developed some new and sacred custodians of governmental beneficences. After securing some definition of the offence, the next step by which the advocates of greater liberty sought their end was an insistence that to constitute guilt—"to compass and imagine the death of the king"—that undesirable state of mind must be manifested by some overt act in execution of its design and of such a nature as was capable of producing actual and material injury to their majesties. The opponents of freedom insisted that the mere utterance of treasonable ideas was in itself an overt act of treason, and therefore an unexecuted treasonable conspiracy was treason. Under our Constitution a contrary view must prevail.[23] In England the view of tyrants usually prevailed.

"Divers later acts of Parliament have ordained that compassing by bare words or sayings should be treason. * * * It was wont to be said that bare words may make a heretic but not a traitor without an overt act."[24] Whether or not mere words could be considered as overt acts was the dominant issue in this long controversy. Lord Coke was among those who maintained that mere words should not be considered as overt acts. Although it was that controversy which our Constitutions were designed to settle, yet the constitutional definition of treason,

[23] Judge Sprague, in his instruction to the U.S. Grand Jury, Boston, Mch. 1861; U.S. vs. Hanway, 1 Wall, Jr., 139—2 Wall, Jr., 204.

[24] English Liberties, (by Henry Care and William Nelson) p. 69.

standing alone, might still leave the way open for a construction which, by merely changing the name of the crime, could yet punish a treasonable utterance not acted upon. No doubt to close this door to a possible thwarting of the original purpose, the guarantee of unabridged liberty of speech and press was thought necessary.

In view of those pre-revolutionary controversies, it is clear that our free speech amendment must be construed as an aid to the constitutional definition of treason, so as to preclude any punishment of mere treasonable utterance, as such, under any name whatever. If this were not so, then we would be accusing the framers of our Constitution of the imbecility of objecting only to the name by which the abridgment of freedom is designated instead of desiring to protect freedom itself. Thus also, the synthetic method implies more generally that the criteria of punishability for any opinion in addition to its expression must include some overt act—must include actual and material injury or at least the intention to inflict such injury accompanied by some act which (according to the known physical laws, not according to speculations about mere psychic tendencies) were adequate to work such injury.

This brings us to the conclusion that the unabridged freedom of speech guaranteed by the Federal Constitution implies a guarantee of impunity even in the advocacy of resistance to our Government as a whole and by a necessary implication it guarantees impunity in the fruitless and harmless advocacy of lesser crimes. To those who have not considered the question, our conclusion may seem a little startling, and on account of this adverse predisposition it becomes desirable to inquire a little deeper into the reasons and precedents supporting it.

Of course, ideal freedom and justice exist nowhere. Even the modern relatively more refined conceptions of freedom and justice, imperfect as they must be, are still in the making and are of recent

date. In consequence of this the precedents are so uniformly on the side of tyranny that doubtless many will be surprised to find any precedents which will furnish even a little support for a doctrine of liberty so antagonistic to those unreasoned predispositions toward flag-idolatry which we develop in our schools by the hot-house method, and which we miscall patriotism. Yet such precedents do exist.

THE CASE OF REV. HENRY SACHEVERELL

Dr. Sacheverell was impeached before the House of Lords in 1710. This, it will be remembered, was not long after the revolution of 1688. The language of his sermon, which was the chief item of the indictment against him, was restated thus: "That the grand security of our government and the very pillars upon which it stands is founded upon the steady belief of the subject's obligation to *an absolute and unconditional obedience to a supreme power in all things lawful and the utter illegality of resistance upon any pretext whatsoever.*"

In the course of the trial Sir John Holland (p. 115) thus denounced the doctrine of nonresistance: "The doctrine of unlimited unconditional passive obedience was first invented to support arbitrary and despotic power and was not promoted or countenanced by any government that had not designs sometime or other of making use of it." This makes the desirability of resistance at any particular time a matter of expediency and therefore a subject proper and necessary for discussion with equal freedom as between the friends and opponents of resistance.

The Bishop of Norwich (p. 518) in giving his reasons for voting for the impeachment, said: "It is a maxim in politics that all governments are best supported by the same methods and counsels upon

[25] Howell's, State Trials, Vol. 15, p. 1. See also numerous pamphlets published on Dr. Sacheverell's case.

which they are founded." As applied to the case at bar and to the American Government, that means: A relatively free government founded upon a revolution is best supported against a relapse into despotism by cherishing the right of revolution even against itself. It also reminds us forcibly that a government having revolution as its origin cannot consistently nor properly suppress advocates of the expediency, timeliness or morality of another revolution.

During the course of the debate the English revolution was defended by Dr. William Talbot, Bishop of Oxford, in these words: "If it be utterly unlawful to resist in any case whatever, even that of a total subversion of the constitution and laws, then there is no distinction of governments, of absolute, I mean, and limited; or if there be a distinction it is a nominal one without any real difference. For what difference is there between princes governing arbitrarily without law, and governing arbitrarily against law? Betwixt having no laws at all and having precarious laws that depend entirely on the will of the prince whether he will observe one of them or subvert them all; and if he does the people cannot help themselves." (p. 499.)

King James, in his speech to Parliament in 1609, said: "A king leaves [ceases] to be a king and degenerates into a tyrant as soon as he leaves off to govern by law; in which case the king's conscience may speak to him as the poor woman to Philip of Macedon, either govern by law or cease to be king."

So then the preaching of the doctrine of absolute non-resistance was adequate to impeach because of a recognition by the House of Lords that the preservation of the right to revolt was essential to maintain even that smaller measure of liberty under the law which was then demanded. On such contentions the impeachment was voted.

THE CASE OF HUGO SPENCER AND SON

Among the precedents cited in support of Dr. Sacherverell's impeachment was the resolution of Parliament in relation to the two Spencers. In the reign of Edward II an act of Parliament was passed to exile Hugo Spencer and his son and thereunder they were banished. In article one of this act it was charged that they had "affirmed and published in writing that homage and oath of allegiance were due more by reason of the crown than by reason of the person of the king, and that if the king did not demean himself according to reason in the exercise of his government, his subjects might remove him, and since that removal could not be by course of law, they might therefore remove him by force."

A subsequent Parliament repealed this act of banishment and the king was deposed by force. This later act of Parliament gives us the highest precedent for the proposition that our several constitutional guarantees were designed to acknowledge the right of ultimate resistance and consequently the right openly and frankly to defend the proposition that at any particular time resistance was or is justifiable and necessary. It was not the purpose of our revolutionary ancestors to penalize mere revolutionary utterances.

Later it will be shown that the idea behind this proposition was that if the right to resistance was freely conceded, then actual resistance would seldom become necessary. Of course, when hostilities are actually begun, then all must take the fate of war, since no abstract principles of liberty or of right will ever restrain the combatants.

THE RIGHT TO CARRY ARMS

Thus far we have examined the significance of the free speech clause in relation to the constitutional definition of treason and have again reached the conclusion that unabridged free speech means the right

to advocate treason (or lesser crimes) so long as no overt criminal act is induced as a direct consequence of its advocacy. We must inquire how far this conclusion is confirmed by the constitutional guarantee to carry arms.

Again the obvious import is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement. It remains to ask how this view is supported by the historic conflicts preceding our American Revolution.

Our revolution only extended the principles of freedom of the English revolution of 1688. At that time, to preclude the government from going into rebellion against the people and to check its power, the revolutionists planted themselves firmly upon these propositions: (1) The illegality of raising money for the use of the Crown without grant of Parliament; (2) The illegality of the power claimed by the king to suspend laws or the execution of laws; (3) The illegality of a standing army without consent of Parliament.

Here, as in the case of Magna Charta or our American revolutions, parchment liberties are not long respected unless backed up by an adequate public opinion and physical force. So these restrictions like the others were ignored when in the contest for power this seemed desirable. Let us not forget that it has always been merely a contest for power rather than for principles, though the latter sometimes furnished the pretext behind which the lust for power was bulwarked. Thus it happened that often the precedents and principles of liberty were promoted even by tories.[26]

In the English Bill of Rights dated Feb. 13, 1688, among the grievances charged and to be eliminated

[26] The Revolution of 1688: The Origin of its Principles. The *Monthly Law Magazine*, July 1838, Vol. 2, No. 6, p. 161; Aug. 1838, Vol. 2, No. 7, p. 391; Sept. 1838, Vol. 2, No. 8, p. 477.

was the "keeping a standing army within the kingdom in time of peace without consent of parliament," which supposedly represents the people. Another complaint was that of "causing several good subjects, being protestants, to be disarmed and employed contrary to law."[27] If we are to erect this complaint against disarming part of the people into a general principle, it must be that in order to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.

The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.[28]

Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright made it plain that the right to resist government was one protected by the English Constitu-

[27] Rapin's History of England.

[28] Examine: Andrew Fletcher of Saltoun, A Discourse of Government with Relation to Militia; A Discourse on National and Constitutional Force, (1757); Cartwright's "A Bill of Free and Sure Defence for Constitutional Revival of County Power; Constitutional Maxims; The British Constitution Vindicated, and Indefeasible Hereditary Right, Unlimited Passive Obedience and Non-Resistance Examined by Scripture and History and Proved to be Absurd, etc., etc., Anonymous, London, 1716; Sir William Jones on The Legal Means of Suppressing Riots; Cartwright's Defence of the Constitutional Right to Organize a Revolution will be annexed as a supplement hereto, and in that connection should be read Thomas Jefferson's letter to Cartwright commending the latter's book, and Jefferson's plan for the military forces of Virginia.

tion.[29] DeLolme's book is known to have had great influence with the makers of our constitutions, and Cartwright's argument was endorsed by Thomas Jefferson in a letter to the author.

THE RIGHT TO PETITION

Of course the aristocrats were going to the other extreme in defence of their evil advantage. They made it a crime to argue against hereditary rights even though no direct and specific reflections upon a government were made.[30] This because "everything is criminal which interrupts the established order of society."[31] They argued that "wantonly to defame and indecorously to calumniate the economy, order and constitution of things which make up the general system of law and government of the country" was a crime because this discredited the authority by which they secured for themselves personal advantage. So they said: "No government could support itself if a demagogue could come forward every year and call a meeting to petition government to dissolve itself." Thus spake Lord Holt[32] in justification of the very antithesis of all that the libertarians already quoted contended for. Our American revolution and constitutions decided that conflict in favor of the former doctrine and therefore our constitution provides a guarantee for "the right of the people peaceably to assemble and to petition the government for a redress of grievances." Recent American legislation with the aid of the courts has re-established a worse doctrine than any I have quoted as obtaining formerly in England.[33]

[29] DeLolme, The English Constitution, p. 213, Bohn Edition, 1853; John Cartwright, The English Constitution Produced, pp. 350, 111, 104, Edition of 1823.

[30] Reg. vs. Bedford, 11 State Trials, 121, Gilb. Rep. K.B. 297.

[31] Holt's Law of Libel, p. 42, Edition of 1816, etc.

[32] Holt quoted in Mence on Libel, 167, etc. Holt pp. 81, 85—16th Edition.

[33] People vs. Fox. 127 Pac. Rep. 1111, and generally decisions under anti-anarchist laws, rout, disorderly conduct, etc.

CONSTITUTION AND DECLARATION OF INDEPENDENCE

The blindness and lawlessness of some of our courts suggest an urgent necessity for at least a little more searching of the records for the confirmation of our theory as to the meaning of unabridged freedom of utterance. This brings us to an examination of American records and here I may say that the judicial dogmatism by its blind reversion to the precedents of English tyrants is of no aid except toward a measuring of the judicial intellect.

"The words of the constitution should be given the meaning they were intended to bear when the instrument was framed."[84] Especially in determining the right of revolutionists to express their minds this compels us to look into the sentiments of our revolutionary forefathers for "It is always safe to read the letters of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of right which is the foundation of free government."[85]

But the Declaration of Independence affirms that "whenever any form of government becomes destructive of these ends [liberty, justice, etc.,] it is the right of the people to alter or to abolish it," and this was their justification for the forcible resistance which was then used. Construing the right to carry arms and the constitutional definition of treason in the spirit of the Declaration of Independence, we must conclude that these are but attempts to preserve equally the means of resisting with the means of upholding government. Then co-ordinating this conclusion with the meaning of the free speech clause, we conclude that it was designed to maintain an equality of intellectual opportunity between those

[84] Scott vs. Sandford, 19 How. 393; 15 Law. Ed. 59—691.
[85] Gulf E. & St. F. Ry. vs. Ellis, 165 U.S., 160.

who might wish to uphold and those who would overthrow the government.[36]

THE CONTINENTAL CONGRESS ON FREE SPEECH

By reading the century-old arguments in support of this view of free speech, we see that the demand for it was made in the belief that the best way to avoid a revolution was to allow full intellectual freedom for its promotion because this would best warn corrupt officials and induce their reform. So freedom to advocate revolution is the best way to avoid all unnecessary revolution. Such, I believe, was the plainly expressed opinion of the Continental Congress when considering the subject of the freedom of the press. It is worth while to quote again their explicit language as to the purpose of mental freedom.[37]

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, *whereby oppressive officials are shamed or intimidated* into more honorable or just modes of conducting affairs."

The same conclusion as to the meaning of freedom of speech is conclusively pointed out by the Virginia legislature and later approved by the Federal Supreme Court. The legislative resolution was drawn by Thomas Jefferson to ensure religious toleration and by defining specifically the limits of religious toleration it furnished general criteria by which to determine the limits of every other kind of toleration.

[36] For the arguments of the time in support of this view of the right, see: James Mill on the Liberty of the Press, also Jeremy Bentham, quoted above.

[37] Address to the Inhabitants of Quebec, Oct. 26, 1774, *Journal of the Continental Congress*, Vol. 1, p. 108, Ed. of 1904.

Here is the language of the resolution: "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency is a dangerous fallacy which at once destroys all liberty because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. *It is time enough for the rightful purpose of civil government for its officials to interfere when principles break out into overt acts against peace and good order.*"[38]

The celebrated Dr. Benjamin Rush was famous among the signers of the Declaration of Independence, and until his death was treasurer of the United States Mint. In 1787, the same year in which he sat as a member of the convention of Pennsylvania for the adoption of the Federal Constitution, he expressed his views about the establishment of a postal system, in which he furnished an interesting sidelight on freedom of the press as understood by our revolutionary forefathers.

Concerning the Postoffice, these are his words: "For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States—every state, city, county, village and township in the Union should be tied together by means of the postoffice. This is the true non-electric wire of government. It is the only means of *conveying heat and light to every individual in the federal commonwealth.* 'Sweden lost all her liberties,' says the Abbe Raynal, because her citizens were so scattered that they had no means of acting in concert with each other.' It should be a constant injunction to the postmasters, to convey the newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but

[38] Reynolds vs. U.S., 98 U.S., 163.

the sentinels of the liberties of our country."[39]

JEFFERSON FOR REVOLUTIONISTS

In Reynolds vs. U.S., already quoted, the United States Supreme Court in speaking of intellectual liberty referred to Thomas Jefferson as "the acknowledged leader of the advocates of the measure" for freedom of utterance and "his words are an authoritative declaration of the scope and effect" of the first amendment.

It will be observed that Jefferson's *criteria* as to constitutional freedom of utterance very clearly point to the doctrine that this shall include freedom for the fruitless advocacy of revolution and impliedly all lesser disturbances of peace and good order. It is important, however, that this shall not be left to mere inference from the general language used in the criterion offered. Because the immediate occasion for the language used was religious toleration, it might be argued that Jefferson would perhaps have changed his mind had he contemplated the application of his general language to the subject of rebellion. This then raises a question as to Jefferson's attitude towards revolutions in general and the toleration of their promoters. Fortunately, here we are again able to quote his explicit language which leaves no room for doubt or argument. In a letter to James Madison written in 1787, on the subject of rebellion, Jefferson said: "I hold that a little rebellion now and then is a good thing and as necessary in the political world as a storm is in the physical * * * An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government."[40]

[39] Principles and Acts of the Revolution by Niles, 235.

[40] Ford's Edition of Jefferson's works p. 362-363; see also his letter to Mrs. John (Abigal) Adams, Feb. 22, 1787, vol. 4, p. 370.

That the rebellion here referred to was not a bloodless one appears from Jefferson's letter to Stephen Smith, Nov. 18, 1792.[41]

"Can history produce an instance of rebellion so honorably conducted [referring to Shay's rebellion]? I say nothing of its motives; they were founded in ignorance, not wickedness. God forbid that we should ever be twenty years without such a rebellion * * * What country before ever existed a century and a half without a rebellion, and what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."

These letters, it must be remembered, were written before the passage of the Alien and Sedition Law. In the campaign of 1799-1800, Jefferson went before the people on the issue of the constitutionality of the Alien and Sedition Law and won a signal victory upon the very issue of his interpretation of freedom of speech. Here then, is the view of the American people as a whole, voting on the very issue of the interpretations of the free speech amendment to the constitution and very soon after the adoption of that amendment. This, Jefferson's pardon of all convicts under that law[42] and the resultant action of Congress in returning the fines which had been paid thereunder, following as that did, the almost contemporary mandate of the people, give for our interpretation of free speech, the highest sanction that any conclusion of constitutional interpretation ever had.

TOWARD THE BROADER SYNTHESIS

Thus the application of the synthetic method of constitutional construction has quite irresistibly led

[42] See Booth vs. Rycroft, 3 Wisc. Rep., 183.

[41] Vol. 4, p. 467. Ford's edition of Jefferson's works.

us to the conclusion that the unabridged freedom of speech guaranteed by our constitution means the right to express with impunity any idea whatever so long as its mere presentation is the only factor involved. If we are seeking criteria of general liberty which could be applied to all cases, we may generalize the conclusion as to freedom in ideas, to freedom as to all conduct not involving actual and material injury and exclude all such from the operations of government. Then we shall have one important factor toward a formula of general liberty.

This partial and tentative conclusion could probably be confirmed by a study of the judicial opinions which uphold liberty by the customary crude empirical inductions. By a succession of these, progressively more inclusive, and by ignoring the dogmatic exceptions to general ideas of liberty by which justices merely evince their tyrannical predispositions, we can arrive at a rational generalization as to the kind of conduct which constitutionally may become the subject of a governmental regulation.

Complete criteria of constitutional liberty must cover criteria as to (1) the source of the regulation; (2) the formalities of its enactment and promulgation; (3) the acts properly subjected to regulation; (4) the qualities of the regulation itself. So far as I am informed the first two of these do not involve specially difficult problems, but this may be due to the fact that I have not sufficiently studied these phases of the problem.

We have already considered somewhat the essentials of constitutionality of means by which liberty may be curtailed as to subject matter legitimately within the province of regulation. These also can be generalized and form another important factor in the criteria of freedom. Thus we arrive at the requirements of generality of application, certainty of meaning and equality of all the individuals similarly situated.

Another element of freedom is the personal one as

to which not much controversey arises. This involves the relation of the individual to the state, and excludes from the usual rule all those who are imbeciles, insane, immature and those who, having capacity, give their consent without fraud being practiced upon them and consciously assume the risk of particular conduct.

I cannot take the space to reproduce all these processes but must rely upon the intelligence of the reader to extend the methods already indicated and thereby to check my statements of the result. Thus successively we combine general statements to give us criteria of liberty as a whole. I will conclude here by offering tentatively such a general statement as to constitutional liberty as our courts have said cannot be made. This may need amplification, especially as to matters upon which there is the least controversy.

Under the constitution social liberty means state protection in a conceded claim of right to freedom from all artificial interference or human penalty in the pursuit of any course of action, except that which in its necessary and most immediate result inflicts actual and material injury upon someone other than a sane, normal adult, participant therein or consentant thereto and consciously assuming the risk thereof; or upon one whose consent was induced by fraud or the coercive influence of human artifice. As a means to this end the legislature may protectively regulate the imminent danger of actual and material injury but this must be done only in such a way as not to prevent or impair any single social or personal use of that which is dangerous—and the dangerousness must be determined in each instance only by known physical laws. Moreover, social regulations must emanate from those specifically authorized to make them, and must be enacted and promulgated in the manner prescribed by the fundamental law. Besides, in content the regulations must be

general in form, certain in meaning, of prior publication and necessarily equal in their applicability to all persons in the same relations to one another and holding the same natural relation to the government; and finally such protective regulations must be manifestly the most appropriate means for promoting the authorized end.

Before the fourteenth amendment, it was held that previous amendments imposed restrictions only upon federal authority. Then the fourteenth amendment to the federal constitution withdrew even from the states all authority to deprive anyone of "liberty" without "due process of law." The question now is, what "liberty" is thus protected against even state-abridgment? Obviously the constitution is the most important source of expressed information as to what is meant by constitutional liberty. Necessarily then, in the fourteenth amendment "liberty" can mean only those fundamental liberties (and must have been intended to include them all) which by previous amendments had been deemed sufficiently important to be expressly withdrawn from federal authority,[48] (not forgetting the fifth which already embodied the same general language). But the liberties guaranteed by earlier amendments to the federal constitution are those which were synthetized in the hereinbefore stated general criteria of constitutional liberty. It therefore follows that by virtue of the fourteenth amendment the above stated criteria of constitutional liberty are controlling even as to the conflict of state legislation with the federal constitution.

The judicial mind often does not work essentially different from the mind of a child. In consequence of this judges are quite often unable to distinguish between what the constitution does say and what the judge thinks it ought to say. Since it never has been

[48]See, State vs. Loomis, 115 Mo. Rep. 307; 22 So. W. Rep. 350-351; 21 L.R.A. 789.

a judicial habit to promote liberty, there is no likelihood that these criteria of constitutional liberty will be either generally or immediately incorporated into the judicial decisions.

It is doubtless true that no such generalization can be made which will fit into all whimsical predispositions or satisfy the lust for power of our judges and legislators. These will be ignored by sensible men who, for correction, will not refer the foregoing paragraph to their "inner consciousness" but will apply only the scientific method. From such persons criticism will be helpful and welcome and probably will result in discovering some necessary amendment to the formula suggested.

It should be added that the above statement as to the dividing line between liberty and the tyranny of the police power is not conceived as an ultimate and final statement of the limits of liberty as these might obtain among people of highly cultivated social consciousness. Our liberties will always be in the making and some future society will doubtless conceive a different social organism wherein different essentials of liberty will prevail. The formula hereinabove offered is designed only to cover the highest conception of liberty to be derived by the scientific method from our constitution and an ideal that we should work toward and may hope to realize in practice under our present governmental machinery.

X

THE HISTORY OF THE SAN DIEGO FREE SPEECH FIGHT

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Since the early history of the town there had been street meetings in San Diego for purposes of agitation, reform and revival. On December 8, 1911, a petition was filed with the Common Council of that city asking for the prohibition of street speaking within a district seven blocks square in the heart of the city. This included the point where E Street crosses Fifth, which four corners, where there is no vehicular traffic in the evening, had for twenty years been dedicated to open air meetings of all sorts. This petition was signed by 85 persons, mostly merchants. They signed this as "citizens and property owners," and the only reason given for their petition was: "This street speaking being considered by us as a nuisance and detriment to the public welfare of this, our city." If it had been a nuisance in fact and law, it could have been stopped without such an ordinance. The sentiment of the community, as will appear, was such as to make very easy the enforcement of the law against "nuisances," had there really been any such in the legal sense. We must conclude, therefore, that the words "nuisance and detriment to the public welfare" are used, not in their legal significance, but as epithets of reproach, indicating only an emotional aversion arising from an esthetic or other offense by the things said, or the manner of saying them and the ill-clad people thus congregated. Indeed, the San Diego vigi-

lantes, whose conduct is to be hereinafter described, have a friend familiar with the situation there, who, in my presence, defended this ordinance on the sole ground that it was unpleasant for "ladies" to pass crowds of ill-clad and grimy-looking workingmen, such as formerly gathered at these meetings. On December 18, 1911, a counter petition, signed by 250 persons, protesting against the passage of the merchants' ordinance, was presented to the Common Council.

On the evening of January 6, 1912, a squad of police and a local real estate dealer of San Diego precipitated a street row while a number of Socialists and Single Taxers were trying to hold meetings in the streets. On January 8, 1912, with the addition of an emergency clause, giving immediate effect, the ordinance was passed prohibiting street speaking within forty-nine blocks. Thereupon the Socialists held a business meeting and decided to fight for what they believed their constitutional rights. When called to give his opinion concerning a compromise, to be effected by erecting rostrums in certain less congested city districts, Mr. F. C. Spalding, president of the Chamber of Commerce, said: "If you give them [these men who wanted to exercise the right of free speech guaranteed by the Constitution] anything at all, it would only encourage them!" This sentiment prevailed with the city authorities, and shows quite conclusively that the objection to street speaking was not founded upon considerations of public health or welfare in the use of streets, nor upon their congestion, but in opposition to the particular opinions which were being expressed, and which were equally obnoxious, no matter where expressed. The Chief of Police announced through the press that the new ordinance would go into effect January eighth. That evening about seven o'clock a crowd collected at Fifth and E Streets, to listen to speakers, Socialists and Industrial

Workers of the World, and to test the ordinance. The police contented themselves with merely keeping the sidewalks clear and a way open for traffic. At that time it was thought by some that free speech had won an easy victory.

FREE SPEECH LEAGUE FORMED

Such hope was however premature. Too many good citizens were opposed to freedom of speech for a cause they disapproved. Those who realized this organized the California Free Speech League the week following the passage of the ordinance. Wood Hubbard of the Industrial Workers of the World was elected secretary, Casper Bauer of the Socialist Party treasurer, and E. E. Kirk attorney. The executive committee consisted of three Socialists, three I.W.W. men, three from each of the labor unions and three from religious organizations. The league printed a leaflet protesting against the passage of the proposed ordinance. The idea that "citizens and property owners" had more rights in the streets than those who were not property owners was ridiculed and there were contemptuous references to the property owners' use of the words "this our city" as showing the latter's ignorant disregard for the constitutional rights of the propertyless persons desiring to be heard in support of their alleged grievances.

On February eighth, 100 policemen were called out to check a demonstration of persons opposed to the anti-free speech ordinance, which, notwithstanding the emergency clause, was construed as not in effect until that day. Forty-one men were arrested, including two lawyers one of whom was the attorney for the Free Speech League just organized. The ordinance, as passed, did not claim to be a regulation for street traffic, but recited that: "This is an ordinance for the immediate preservation of the public peace, health and safety and one of emer-

gency, and shall take effect from and after its approval and passage." Was this statement believed? If, in fact, prior to this time there had been any unusual disturbance, or agitation of the public mind, or epidemic of contagious diseases, such as could justify this official recital, then all public meetings would have been suppressed, those within halls and churches as well as those in the open, because contagion is less probable in the open air than within inclosures. Since only street speaking within a limited area was prohibited, I conclude that the claim about the imminent danger to public health and peace was a deliberate untruth. In England, long ago, it was said that "Plowden, in pp. 398-400, has reported a variety of cases wherein acts of Parliament were esteemed void in law through the want of truth in their recitals." *

One wonders if it is really expecting too much to ask our American courts to follow this old precedent when invoked by the propertyless citizens of San Diego. The failure of the authorities to enforce the ordinance for a period of thirty days after its passage suggests that it was suspected that the false recitals annulled at least the emergency clause. But if that, why not all?

The ordinance prohibits singing upon the streets even though there is no public assemblage. It prohibits "any person to address any assemblage, meeting or gathering of persons." How many persons does it take to constitute a prohibited "meeting"? Clearly two persons meeting upon the designated streets holding an ordinary conversation in the public highway are as much within the letter of the ordinance as though 200 listened to the same discourse.

VAGUENESS SHOULD MAKE ORDINANCE VOID

If the council intended to penalize all conversa-

* Cartwright's "English Constitution Produced and Illustrated," p. 132.

tion upon the streets it clearly exceeded its authority, and the whole ordinance must be void, because the court cannot by judicial legislation make the separation.†

If the ordinance did not penalize all discussion and conversation in the designated public streets, extending even to two or three persons participating in a meeting, then it must be that criminality of a speech or discussion in the restricted public places depends upon *the number of persons gathering, hearing, or otherwise participating in any meeting.* Then the question arises how many persons must meet in a public place for discussion before they are either an "assemblage, meeting or gathering of persons" within the meaning of the ordinance? Manifestly the ordinance does not furnish us any information as to the criteria of crime in this respect. The criteria of guilt necessarily involve a determination of the number of persons necessary to constitute an "assemblage, meeting or gathering" of this prohibited kind and this essential element of the criteria of guilt cannot be created *ex post facto* for several constitutional reasons, as I have elsewhere shown.

Many will still wonder if this ordinance may not be warranted as a traffic regulation for the growing village of San Diego. This has been urged, but, it seems to me, chiefly as a cloak to conceal the true motive. Perhaps we can best straighten out our perspective in this matter by inquiring how such matters are managed in New York City. Here the only function of the police is to quell actual disturbances and keep open the streets for traffic. The whole matter is covered by a circular of instruction to the police, which reads as follows:

† This, I understand, is the logic of such cases as Howard vs. Ill. Cent. R.R., 28 Sup. Ct. R. 141.

POLICE DEPARTMENT

City of New York

New York, July 1, 1912.

Circular No. 22.

No permit is required to speak in the public streets. The law is that the paramount right in the street is with those who pass over it. The right to make a speech in the street is secondary to that right, and no one, by speaking or otherwise, can obstruct the street so that it is impassable.

R. WALDO, Police Commissioner.

WHOLESALE ARREST OF IDLE POOR

On February 18, 1912, in order to more thoroughly intrench the official lawlessness, the City Council of San Diego passed the following ordinance: "Any officer designated by the Chief of Police to perform such duty shall control the movement and order and stoppage of persons, street cars, vehicles and animals in or upon any public street, and disperse any unusual and unnecessary assemblage of persons or vehicles that are obstructing or impeding, or to such officer *shall seem likely to obstruct or impede,* the free passage of persons or vehicles along said streets." Further to help along this work of suppression, the Superintendent of Police John C. Sehon issued to Chief of Police Wilson the following: "Order a general roundup of all male vagrants and hoboes. Notify all officers to bring into the police station for investigation all suspected 'crooks' and 'macques.'" Chief Wilson added to this statement: "We are going to rid the city of beggars and crooks and the idle who don't want to work. The many petty crimes and too frequent hold-ups in San Diego [conveniently remembered by the chief at this time] have got to end, if we have to arrest every vagrant in the city and drive them beyond the city's gates." When referring to "the

idle who won't work," of course, he did not mean to include rich idlers who won't work.

On February thirteenth, between 7 and 8 p.m., eleven men, in a crowd of 1,000, arose consecutively to make speeches, and were immediately pounced on and hustled off to jail, amid cheers from sympathizers. And such work continued daily, with subsequent crowding of the prisoners like cattle while they were awaiting trial without bail, concerning the excessive amount of which Judge Sloan refused to hear testimony from the defendants.

UNSPEAKABLE INDIGNITIES TO PRISONERS

Jail treatment may be judged of from a letter written by one of the prisoners, in which he states that thirty-six men were put into a room 16x16 feet, with an open toilet in it and two small windows, half open, for ventilation. When one man fainted and the police were finally persuaded to take him out, the door was immediately closed on the others. Prisoners were kicked on being put into the cell, and when water was requested one jailer suggested the toilet. On the route from the city to the county jail, one prisoner who murmured to another about constitutional rights was heard by a detective, who informed him that he would "smash his head if he spoke again." In the county jail thirty-three men were put into a cage where four hammocks provided poor accommodation for twenty men, thirteen sleeping on the steel floor. From Thursday night until Saturday morning they got no water to wash with, and even then no towels. Meals consisted of four ounces of bread and mush in the morning, and a small portion of stew or beans—sometimes rotten and sour—at 3:30 p.m.

FREE SPEECH PAPER

"Insist that the Constitution is the fundamental law of the land," wrote Casper Bauer in *Free*

Speech, the organ of the California Free Speech League, in its issue of February sixteenth, "and go to prison; there you are fed out of a trough like swine, and sleep on a bare cement floor without a rag to cover you!" A vigorous campaign of protest was undertaken.

BRUTAL ACTION OF OFFICIALS

To help along the work of the oppressors there was tremendous delay in coming to trial. As early as February nineteenth, two of the men arrested told the court that they wanted immediate trials. The judicial temper was displayed in this rejoinder: "It would take about five days to each case," said the judge, "and there are 100 ahead of you. Looks like you get a trial the latter part of next year, doesn't it?" The men admitted it did. And meantime the arrested were being held under excessive bail. Conditions constantly grew worse.

In a letter written by a prisoner, Alexander McKay, on February twentieth, he stated that there were *seventy-eight* advocates of free speech confined in a room intended only for *twenty* inmates. The beds were merely iron frames with canvas stretched across. The supply of blankets being exhausted, it was alleged, all the later comers had to sleep on the bare concrete. As a result fifty men applied in the morning for medical aid, 90 per cent of whom were ordinarily healthy young men under 30 years of age. One petty cruelty consisted in taking away the glasses of men who were nearsighted. Nevertheless the prisoners kept up a stanch spirit.

District Attorney Utley made a statement that "any man who has no work ought to be put in jail, especially if he wants to talk about it." Local 13, of the I.W.W., began now to issue invitations to all those who believed in the right of free speech and who were not employed elsewhere to come in any way they could and join the San Diego free speech contingent.

Interest in the fight was not confined to the I.W.W. On February twenty-fourth the Central Labor Council of Los Angeles sent a copy of a resolution of sympathy and support to the Federated Trades Council of San Diego.

PRISONERS SERENADED

On February twenty-sixth, 2,500 men and women joined in a large, orderly parade through the city to demonstrate their interest in the cause. Attempts were made by the police authorities to stir up trouble and break up the parade, but in vain. The marchers kept on their quiet way, and before the city and county jails furnished music to encourage the prisoners.

LAWLESS SPIRIT OF CAPITALISTIC PRESS

Meantime the problem of caring for so many prisoners became of growing importance. *The San Diego Tribune editorially advocated taking the men out of the jails and shooting or hanging them.* Had such matter been published in the interest of laboring men, no doubt arrests would have resulted for a violation of our postal laws, but in San Diego, as elsewhere, the rich can do no wrong. The conspiracy charge on which some free speechers had been arrested was changed to a charge of vagrancy. And finally Chief Wilson decided to offer the men jobs so as to keep them from attempting to speak in the city, and was surprised and annoyed when he found that they refused. As one of them said: "That's what we're for, to keep your jails full until you fellows realize the fact that we are going to have our rights." Finally the attempt was made to discourage the coming of volunteers by the vile treatment of prisoners, as evidenced by a continuous flow of letters by them from the prisons. In one of these it was stated that Chief Wilson came to the door every morning and informed them if there was any

one there sick he would be turned loose, provided he pleaded guilty. This trick of misleading humanitarian appearances also failed.

INVESTIGATION DEMANDED

A formal notice was sent to Governor Hiram Johnson, requesting that he make an investigation of the conditions in the city jail and of the treatment of prisoners, both male and female, before and after the arrest and confinement. Attorney M. S. Quinn went before the Grand Jury and made the same request. Complaints were met with the statement that the Common Council and the Police Department were doing their own work. No one was permitted to go into the city jail; no medical attention was given the prisoners, and friends who furnished eatables and requested the police to give them to the prisoners had their requests denied. District Attorney Utley kept putting off a preliminary hearing, although some of the men had been locked up thirty days. It was also alleged that he requested Sheriff Jennings, of the county jail, to starve the prisoners to force recantation of their principles. This the Sheriff refused.

By March fourth nearly 200 men were in jail and were being shipped to jails in surrounding counties. It was also said that 500 extra policemen had been added to the force and that a march of the unemployed would start for San Diego that week. The San Diego Council passed, in addition to the anti-free speech ordinance, an anti-picketing ordinance. Besides, the Board of County Supervisors decided, on recommendation of the Grand Jury, to employ an armed, mounted guard to patrol the San Diego County line and turn back all the I.W.W. men who attempted to get into San Diego, arresting and imprisoning all who should resist them.

POLICE START LAWLESS PERSECUTION

Finally, the police force started to enforce a new

method of keeping the jails from being overcrowded, and made the *San Diego government a synonym for shame.* Dave Brooks, a member of organized labor, in good standing, a peaceable, law-abiding citizen and a bona fide resident of San Diego was the first victim. At midnight, March eleventh, he was arrested for selling the *Labor Leader,* a newspaper that was presenting the worker's side about the tactics of the fight. The following is from his own letter refused publication in the San Diego *Sun,* a "capitalist" paper:

"While selling *Labor Leaders* on E Street Monday night I was picked up by Chief Wilson, thrown into an auto, and then taken to the police station. They brutally jerked and shoved me into a room, and Chief Wilson, Joe Meyers and two other thugs heaped every vile abuse that their vile tongues could call into use. I had about twenty copies of the *Labor Leader.* They dragged them out of my hand and tore them into shreds. Wilson would ask me a question, and if I did not answer it as he thought I should, he would shake his fist and threaten to knock my G—d d—d head off my shoulders. He dragged me by my clothes, threw me into an auto and took me out to Sorrento, where I was kicked and slugged and told to hit the railroad, and if I ever came back to San Diego I would be killed and thrown into the bay."

The Council of the Federated Trades decided to take action against the police officers who abused Brooks, and declared that the best lawyer in the State would be hired to prosecute the case.

HOSE TURNED ON WOMEN AND CHILDREN

Another novelty of the police tactics was instituted the day previous, when a peaceful crowd of about 3,000 persons was assembled to hold religious services under the direction of Rev. Lulu Wightman. The police with the aid of the Fire Depart-

ment, turned the hose full force upon this crowd, causing, of course, great damage and much injury, knocking down old men, women and children with drastic equanimity. This outrage was perpetrated without warning. After the Fire Department had been called up, the hose was brutally turned on the audience, and directly upon the speaker's face. A crowd surrounded the speaker's stand until they were driven from the platform in a long and vigorous battle with the hose. Hundreds surrounded Mrs. Emerson, a speaker, and withstood the terrible onslaught for over an hour. The hose was then pulled up to within a few feet of the drenched men and women and its terrific force turned full in their faces, until they were swept from their feet, and the speaker, nearly drowned, was forced from the stand. For three hours the crowd, dispersed at one point, would congregate at another, while the hose followed it. One young lady, singled out because she was selling *Leaders* at the meeting, received five minutes of personal water cure. Another person grabbed the American flag and wrapped it about his person. He was swept down, grabbed and roughly handled, jailed and fined $80 for desecrating the flag. All this, of course, was done in the name of law and order. If some new social order shall follow the San Diego precedent and methods, will the capitalist minority of that time acquiesce in silent glee?

PEACEFUL CITIZENS CLUBBED

That evening a street meeting was charged by the police with drawn clubs. One woman was knocked unconscious and left on the pavement, while all who tried to rescue her were beaten. Also at an indoor mass meeting an attempt was made to stampede it by needlessly calling out the Fire Department to the building.

Meantime, the first trial had ended in the conviction of Joseph Mickolash, who was sentenced to

thirty days in jail. But this did not dismay the advocates of free speech, who claimed that it was a jury composed only of anti-labor men.

Everything that the anti-free speech men could think of was used in the campaign. It was claimed that all those were arrested who were found selling copies of the *Herald,* the *Labor Leader* and the San Francisco *Bulletin* (almost the only papers which showed up the police methods), while venders of the *Tribune* and *Sun,* which took the side against free speech, were left unmolested. Such tactics had begun to alienate even some business men in San Diego, though few dared openly to express their sentiments in favor of free speech. However, one Sol. Stone, of the New York Shop, a Russian by birth, openly said for publication: "I lived for years under the despotism of the Czar and witnessed the methods by which the officials of Russia suppressed any effort of the peasants to better their conditions. I have read accounts of such atrocities in your American newspapers, and so have you, but in all the years I lived in Russia I never witnessed such inhuman treatment by the Russian police as that meted out to the members of the Free Speech League in this 'Land of the Free.'"

Of course the treatment of the prisoners had in one or two cases the desired effect, and such men agreed to drop the fight for the right to use the public streets. It was reported that the federal immigration officers would visit the Riverside and Santa Anna jails to make a vigorous investigation of the prisoners sent there. In view of the condition of the San Diego jail, it was declared that the government would deport any prisoners who were foreign anarchists and had not been three years in the country. The secretary of the Free Speech League was arrested, accused of having sent inflammatory literature abroad for publication in radical papers. Of course, *nobody was arrested for*

inflammatory literature published in the interest of official lawlessness. Four policemen resigned from the force, stating that they had too much manhood to remain, and that tactics such as had been adopted were ordered by their superiors in office. The Central Labor Council and Building Trades Council of Los Angeles had passed resolutions on March twenty-second pledging to their brothers and sisters of San Diego moral and financial support, and calling upon organized labor throughout the city to enter this protest and to assist the suffering in San Diego.

PRISONERS SHOT AND DEPORTED

By this time, March twenty-eighth, details were published of the outrageous treatment of prisoners by the self-constituted vigilantes, men who undertook to help the police in diminishing the population of the jails by lawless methods, but, of course, under the same old pretense of law and order. The *Herald,* a fearless paper, whose editor was to suffer later for its fearlessness, published affidavits of some of the victims. One of them wrote to San Diego Local 13, of the I.W.W., as follows:

"We write to let you know what happened to us yesterday. Twenty-one men arrested; ten were put through the third degree. We were held in the station till about 10 p.m., then, in bunches of fives, were kidnapped by vigilantes. Some were loaded into autos and ditched twenty-eight miles off, without a bite to eat.

"Then, in bunches of five, we were unmercifully assaulted with clubs and guns, and in the darkness were cornered and driven through a barb-wire fence. Several shots were fired, and some of the men are badly scratched and bruised. Two men were very nearly killed and may not survive. Out of the twenty-one arrested, eleven are at this place (Encimitas), and the two dangerously wounded are on the way to the hospital; five are still missing. Our

automobiles went on by us. We then went back to where we had been assaulted, and camped for the night under the large tree mentioned before.

I further state that I received no food of any description from the time of my arrest, at 10 o'clock Friday morning, until Saturday evening at 8 o'clock.

J. C. LATTELL, Affiant.

FURTHER OUTRAGES THAT WOULD SHAME RUSSIA

State of California, County of San Diego, ss:

I, John Stone, being first duly sworn, according to law, do depose and say as follows:

That I am an American citizen of the age of 37 years, and was born at St. Louis, Mo.

That on the 22d day of March, 1912, at the hour of 2:30 p.m., I was taken in custody by officers of the detective force of the City of San Diego, and was taken to the second floor of the police station of said city, where I was detained until 12 o'clock midnight, at which time I was taken downstairs and placed in an automobile with Joseph Marko, another man who had been arrested at the same time as myself.

There were four parties in civilian clothes in charge of this automobile, one of the said parties I have since identified as —— Bierman, a reporter of the San Diego *Union*. We were taken out of the city, about twenty miles, where the machine stopped and this man, Bierman, said to me: "Come on, big fellow, you next." And turning to Joseph Marko, said: "You stay in there, kid."

Then one of the escorts said to me: "Look at me, who are you?" At the same time a man in the rear struck me with a blackjack several times on the head and shoulder; the other man then struck me in the mouth with his fist. The man in the rear then sprung around and kicked me in the stomach. I then started to run away, and heard a bullet go

past me. I stopped at about 100 feet distance and turned around. I saw them take out of the second car Joseph Marko, whom they proceeded to beat up, during which time he stood in the light coming from the second machine. I saw him knocked to the ground several times, and he gave several loud screams.

He shortly after came up to where we were, and we all four hid in a little gully close by until the machine went by us. After which we returned and camped for the night under a large tree close to where we had been assaulted.

In the morning I examined Joe Marko's condition, and found that *the back of his head had been split open* and a large amount of blood had flowed, to such an extent as to cover his coat, vest and shirt with blood.

JOHN STONE.

POLICE THREATEN MURDER

State of California, County of San Diego, ss:

John Cassidy, being first duly sworn, says: I am a cement worker, born in New York City. I was arrested on Wednesday, March 13, 1912, about 8 p.m., on the corner of 5th and E streets, by uniformed police officers. Was taken to the police station and there questioned for fifteen or twenty minutes, and then taken to a room in the headquarters, not in the jail, and locked up for about seven hours. About 10 p.m. I was placed in an automobile by four officers and taken to Pacific Beach. On the way out there one of the officers asked me what choice of death I preferred, whether being thrown from the cliff or fed to the coyotes. Said I was husky enough to dig my own grave. On arrival they ordered me out of the auto, and one officer pulled out a club and a loaf of bread, and struck me twice with the club, and gave me the loaf of bread and said: "It's 100 miles to Los

Angeles; if you come back to San Diego inside of a year, we'll kill you." He then left me, keeping the auto searchlight on the railroad track. I slept in the open all night, and walked back to San Diego this morning, arriving about 9:30 a.m.

(Seal) JOHN CASSIDY.

Subscribed and sworn to before me this 14th day of March, 1912.

ESTELLE W. KIRK,

Notary Public in and for the County of San Diego, State of California.

Particularly cruel was the treatment of one Hughes, who had dared to admit his sympathies were with the free speech propaganda. The friends of Mr. Hughes—and he has many—are bitterly resentful against the Police Department. As the affidavit of Hughes follows there is no need to tell here every particular of the cowardliness of Chief of Police Wilson in this matter. It is enough to say that Mr. Hughes is a cripple—63 years of age—that he had worked for twelve months doing what he could, in the Helping Hand Home, for a mere subsistence, and that, when taken before Chief of Police Keno Wilson, who, unable to make a charge of vagrancy stick against this old, crippled man, said: "You may not be a vagrant now, but I'll make you one, and then I'll get you!"

TRY INTIMIDATION OF AGED MAN

State of California, City of San Diego, ss:

J. S. Hughes, being first duly sworn, deposes and says: That about April, 1911, I was compelled, by failure in health and business, to seek light employment for my subsistence. I was recommended to the manager of the Helping Hand Home as being qualified to render assistance to said institution, and on personal application my services were engaged, serving as office help, and the compensation for this was my meals and a permit to use my own bed

and bedding in the chapel room. Next I was given a nursing position at $10 per week and paid for my room and board. When this work was no longer required, I was given a position as clerk in the rummage sale room of that institution, and waited on table during same time, and my wages were $1 per week. Next I was made solicitor of aid, getting ten per cent of collections and at the same time aiding in a general way.

My interest in the welfare of the institution was found so great that without my request or knowledge efforts were being made to place me in management. The superintendent, Mrs. A. E. Dodson, and coworkers asked me if I would accept the present position when the manager resigned, which was to be in the near future. Later on it may be necessary for giving reasons why I didn't become manager, however. I will state now that it became public that I was a Socialist and member of the Free Speech League.

On January 6, 1912, I was a spectator during the police raid at 5th and E streets at the time of Charles Grant's arrest. Policeman Boucharee subpoenaed me for the prosecution, and shortly I was called to the police office and questioned by Policemen Wisler and Carse, and which proved to them that I would be a damaging witness. Therefore I was released.

At about 2 o'clock p.m., March 10, 1912, I was standing on the sidewalk in front of the Socialist headquarters, when I was arrested under charge of vagrancy by Frank Boucharee, city detective, and taken to the private office of Chief Wilson at the police station. Soon after Chief Wilson and Boucharee entered the room, Boucharee charged me of being on city charity and being an I.W.W., also that I was creating great disturbance at 2d and F streets by hollering and vilifying the police. First, I denied the charges. Second, I stated that

I was employed at the Helping Hand Home and had been there about a year. Third, that I am not an I.W.W. I am a Socialist and member of the Free Speech League. Fourth, I did not disturb the peace, and offered the proof. Part of my papers was taken from my clothes when these were returned to me.

They used very abusive language to me and acted very mad toward me and during the time they were talking to me, Chief Wilson said at three different times that he would report me and see that I was discharged from the place I was then working, and then get me as a vagrant; then he would see that I got out of town. Soon after I was told that I was released.

On about March 14, 1912, Mrs. A. E. Dodson, wife of Councilman Dodson, made a special trip to the home and delivered a message to me that she had a message from Mr. Dodson for me; that he was one of the directors of the institution, and you know that he could not and would not tolerate any one staying at this place who was against the ordinance against free speech; then we had some more talk and she went away.

Now, on March 15, 1912, she came back again and asked me if I still persisted in being a Socialist and member of the Free Speech League and reading their literature and taking part in the free speech fight. Yes, I do persist in being a Socialist and believe in free speech. Then, she said, my services were no longer wanted, and she said I could vacate at once.

This affiant now states that he has made his home here for the last four years and is a registered voter of San Diego County, Cal.

J. S. HUGHES.

The vibrant spirit of outraged humanity and intense revolt produced in some persons by these atrocities may be seen in the following impassioned

letter from J. Edward Morgan, and the invincible fight for the cause of free speech is to be noted in the postscript.

(After the cessation of hostilities The Free Speech League of New York sent to every person in the telephone directory of San Diego a leaflet by Hutchins Hapgood entitled "Fire and Revolution." This effort at increasing intellectual hospitality had little effect. It was not until June, 1915, that Emma Goldman was again allowed to make a public speech in San Diego. Then she made three addresses to large and appreciative audiences. The friends of law and order having lost their interest in such matters, no riots resulted.)

PASSIONATE SUMMING UP OF POLICE INJUSTICE

Editor *Herald:*

Congratulations on the splendid work you are doing in defense of human liberty. The last issue of the *Herald* is a tornado. I don't wonder Chief Wilson got busy arresting the newsboys for selling it. If the 40,000 in San Diego could read last week's *Herald,* it seems to me they would organize vigilantes to escort Wilson, Sehon, Myers, Sheppard *et al.* out of town, give each a loaf of bread with the admonition to "keep going south."

The *Labor Leader,* also Kelly, is sure dealing them some broadsides that will be echoing in San Diego when the Gorgons at the police station have decamped for more congenial climes. And it's a crime to sell the *Herald* and the *Leader* and the San Francisco *Bulletin* in San Diego, is it? And it's a crime to sing songs on 5th street? It's a crime to lend sympathy to those who defend constitutional rights with their lives. But it is not a crime to bludgeon women till they lie bleeding, unconscious on the pavement—to drench women and children with fire hose and to drown babies.

It is not a crime for Chief Wilson to order his

police thugs, twenty strong, armed with guns and clubs, to handcuff unarmed, inoffensive non-resisting men and boys, weak from want of sleep and food, and beat them till they fell bleeding and dying from the blows.

How many have been thus beaten in San Diego? Who has done the murderous deed? What part did Chief Wilson play in this hellish act? And Myers, and Sheppard? And how many more are they going to maim and kill before San Diego cries "enough" and puts these inhuman monsters dripping with the blood of noble men and women and babies in the penitentiary or swings them from the gallows? How many more must be sacrificed to the maw of these Gorgons before all California awakens and puts these mad beasts in irons? How many more? Answer me, all ye humans in San Diego.

Tell this through the *Herald* to Chief Wilson: "The Federated Trades of Los Angeles have condemned the San Diego butcheries, and throttling of free speech, and they have called on organized labor everywhere to send financial aid to the liberty loving men and women of San Diego, valiantly battling with wild animals for their lives.

LOS ANGELES SENDS MONEY AND SYMPATHY

Tell Wilson that Labor Temple was packed pit and dome Sunday night to hear the ghastly story of the bloody butcheries that are crying the shame of San Diego to the world. Tell him that when Morgan—whom he so loves—told the story of the fire hose, the police clubs, the beating of women, the unlawful arrests, the man-handling in the jails, the vile language and murderous actions of the monsters called officers in San Diego, of the murderous deeds of the twenty thugs in autos, who left their bludgeon-beaten victims to die on the highway, that when I told the hellish story and called

for money to prosecute these assassins and send them to the penitentiary, that a business man held up a $100 bill and cried for every man who is a man to prove himself and come at once to the help of the noble little band fighting to the death for great and eternal principles. Tell Wilson that another arose and gave $50, that hundreds of dollars rained down upon the platform, that all San Diego and all California and all America might know that a handful of conscienceless human hyenas cannot murder men for exercising constitutional rights and escape the penalty for every one of their dastardly deeds.

Tell him, through the *Herald,* that when I told the story of the assault with fire hose on Mrs. Wightman, the evangelist, that the great audience called her to the platform and for a half hour she told the awful story of the depravity of the "Law and Order vultures" of San Diego, as Mrs. Wightman can tell such stories with her matchless eloquence. She told the story and the great audience listened appalled, aghast, breathless with astonishment, and they wondered what age and what country is this.

Tell Chief Wilson and the curs he sent to do this cowardly midnight deeds that Morgan's tongue cuts deeper, keener, with tenfold power to waken the sleeping to action since he saw and talked for hours to the men and boys who have come bleeding and mangled to Los Angeles.

The fine-faced, big, brown-eyed Greek, loved by all who know him, whose classic face and soft, expressive eyes remind us of the old heroic days of ancient Athens, is here. God, how they must have clubbed him! A deep cut in his cheek, face swollen and lacerated, an eye nearly closed, body black with bruises. God almighty, men and women of San Diego, if I was on the box there now I would tell the story. Wouldn't I tell the story? And wouldn't

the lying, sycophantic *Union**—union with hell—howl and belch and lie next day? Wouldn't it?

Listen! Day after day the Greek tells the story how Chief Wilson directed all, how they handcuffed him to another man and then held his other hand out horizontal, "like Jesus on the cross," he explains as he extends both arms while he tells it—then they beat him in the face, on his body, clubbed and cursed and threatened to kill him—and others the same.

Hundreds in Los Angeles hear his awful story every day, they see his mangled face, they look at his bruised and swollen arms, his deep-gashed cheek, and then they cry: "My God, my God; and they do that in San Diego!" And then people ask in wonderment, "What did you do that they would beat you like that?"

"I started to sing a song about Casey Jones, the scab," softly answers the Greek.

Yes, they will kill men and bludgeon women and drown babies for singing songs on the streets in San Diego. But how long will they do it? Good God! Let us awake! Let us act! Come on, men and women of California, awake, brave souls of America! This brutality must stop. Two hundred and fifty men and women are starving in filthy jails. They must be given their freedom! Liberty is too great a boon to be murdered in the streets by conscienceless, ignorant brutes called men because of their enormous weight. Lend a hand in liberty's sacred cause—lend a hand!

Yours in the fight for liberty until death,

J. EDWARD MORGAN.

P.S.—Tell them, Myers and all, I am coming back to San Diego to help celebrate the victory of man over Gorgon.

The spirit of those opposed to free speech was shown by the statement of Major William D. Hall,

* The *Union* is one of San Diego's "capitalist" papers.

a veteran of the Civil War, who said: "I have an army of 200 volunteers at my command already and I am going to make it 500. The volunteers are law-abiding citizens of San Diego. We are going to repel all invaders, and will march every lawbreaker to the edge of the city, strip him of all clothing, give him a coat of tar and feathers, and let him start his march to the north to get along as best he can." Of course, he meant labor lawbreakers, and in the name of law he meant to determine their guilt without accusation, testimony or trial.

OLD MAN BEATEN BY POLICE DIES

Things finally reached a desperate state with the death of one of the prisoners, Michael Hoey, a man of 65, who was arrested on the night of February twelfth, on 5th and E streets, for attempting to speak. He was roughly handled when arrested, and at the city jail, after being kicked and otherwise brutally beaten, was left to sleep on the concrete floor without any bedclothes.

He was confined in the jail for thirty-eight days. During this time it was claimed that when a cathartic was needed by him he was given instead a powerful emetic. After repeated efforts Dr. Leon De Ville was finally admitted to the jail on March twenty-first, examined Hoey, reported to Chief Wilson that the old man was in a bad condition, and requested permission to have him removed to a private hospital. This Chief Wilson refused to do. Dr. C. A. Magee, the jail physician, was called in, and claimed that Hoey was well, but was "shamming." But when Dr. De Ville insisted that Hoey was beaten up badly and needed immediate medical attention, permission was finally granted to have the old man removed to the Agnew Sanitarium, while Dr. De Ville was forced to pay out of his own pocket a fee of $14 for the removal. On March twenty-eighth Hoey died at the sanitarium,

death being caused, according to Dr. De Ville, through rupture, brought about by kicks in the stomach and groin. Dr. De Ville filed charges. Of course, the police claimed that Hoey had received his injuries before his arrest.

OUTSIDERS PROTEST TO CHIEF WILSON

Meantime persons connected with the national Free Speech League with headquarters in New York, as well as members of the American Federation of Labor, sent to Chief Wilson a letter protesting against the outrages and calling upon him to have them cease. The letter also requested him, if he had any answer to make to these charges, to make them before a committee chosen by him and by the attorneys, or before the City Council. Also, in Los Angeles, Edward J. Morgan and the Rev. Lulu Wightman and Casper Bauer kept on making eloquent speeches, and rousing considerable financial support for the San Diego martyrs.

The issue of the San Francisco *Bulletin* which printed a full page article headed "Gag Law vs. Free Speech in San Diego," containing a summary of the whole course of the free speech fight up to the date of publication, March thirtieth, and giving the affidavits of the maltreated and kidnapped, was suppressed in San Diego. Fifteen men selling copies of this paper were arrested and their copies confiscated, of course in the name of law and order, although not even an unconstitutional ordinance or statute authorized this procedure.

The next step of the authorities was a movement to run the I.W.W.—who, by the way, were only part of the fighters for free speech—out of the city. "Every anarchist in San Diego will be arrested; no one shall be allowed to escape," said Chief Wilson, while engaged in distributing rifles. "I assume that there are 500 of these fellows here now. All of them will be taken in just as soon as we can

get them. Some will be charged with vagrancy and sent to the penitentiary, the others will be sent from the city. A force of 250 is now headed this way from Los Angeles. They should know now that under no conditions will they be allowed to come here."

Michael Hoey was buried on March twenty-ninth, surrounded by sorrowing fellows. As was to be expected the inquest held by the colleagues of the officials who had beaten and otherwise brutally treated the old man declared that he did not die from maltreatment. But in a sworn statement by Robert Baxter, a friend of his, it was claimed that Hoey and he, on February seventh, walked 140 miles in five days, and that he was evidently at the time hale and hearty. It also was claimed that Hoey had told him that he had been violently kicked in the stomach, and that two or three days later he saw a lump on Michael Hoey's left groin which looked like a rupture, and that it was after this that Michael Hoey grew sick.

FREE SPEECH FIGHT STATE-WIDE

The free speech fight began to spread to other cities. Chief Wilson telegraphed to Los Angeles a warrant for the arrest of H. Rosen in that city. And, on the other hand, the Machinists' Union of San Francisco had bidden the Labor Council to protest to Governor Johnson against the brutalities of the San Diego authorities, which continued regularly during all this time. In Los Angeles, on March thirty-first, a mass meeting of the citizens publicly protested against the San Diego methods.

Even Messrs. Moore and Robbins, the two attorneys who represented the California Free Speech League after the arrest of Attorney Kirk, and who had valiantly continued fighting for their clients and for the right of free speech, were threatened that they would be "run out of town" by Chief

Wilson. And ninety I.W.W. men were prevented from crossing the county line by the deputy constables. Some of the men, according to the public statement by County Supervisor Fischer, were severely clubbed. The Federated Trades drew up a list of charges against the local officials and presented it to Superintendent of Police John Sehon.

LAWLESS OFFICERS OF THE LAW

A variation on older methods was introduced on April fifth, when 100 I.W.W. men, on their way to San Diego, were met at the Orange County line, near San Onofre, and there, by the deputy constables, under threat of physical punishment and shooting, were forced to kneel down and kiss the American flag because of the pretended accusation of being "anarchists." They then were warned to stay out of San Diego and were started on a march in squads of five, in command of the deputies, to the tune of "The Star Spangled Banner."

The California Free Speech League prepared then to help the Committee of Protest, and invited Chief Wilson, Superintendent Sehon and the rest of the council to be present and defend their work if they could. Protest also came from the county convention of the Socialist party of San Mateo, demanding that Governor Johnson take action to abolish the condition of affairs in San Diego.

EDITOR KIDNAPPED AND THREATENED WITH DEATH

A most brazen deed of the vigilantes occurred on April fifth, at half past ten in the evening, when Abram R. Sauer, editor of the San Diego *Herald,* which had been fearless in its publication of the truth in the struggle, was, under cover of darkness, actually kidnapped at his own home by six vigilantes. Mr. Sauer yelled murder four times and this drew a crowd, so that some of the vigilantes were recognized. However, Sauer was forced into

an automobile and the party was soon out of the city. The affair was reported to the police, but it took them several hours to make a move. It was suggested that they knew what was going to happen, and, consequently, had become very "busy" at that time. The automobile headed for the country. On the way out the editor was threatened with all kinds of deaths and finally, according to the assertion of the *Labor Leader,* a halt was made near Escondido and he was released. The next day he went to Los Angeles, where it was said he would engage the legal services of ex-Governor Gage in order to prosecute the vigilantes.

It was also asserted that two or three men had been murdered by the constables at the county line, where, after their expulsion, several I.W.W.'s had started to camp.

Shortly after this, on April 11, 1912, the San Diego Chamber of Commerce went on record as publicly approving the action of the City Council, the Police Department and the Citizens' Committee (the vigilantes). The Chamber of Commerce, of course, cannot be accused of being "anarchists," and their approval of such conduct shows what "law and order" means among the "refined," "educated" and wealthy citizens of San Diego, many of whom no doubt believe in excluding from our shores "vicious and ignorant foreigners," and such anarchists as Count Tolstoy.

EDITOR CANNOT BE BRIBED TO STOP PAPER

At this point of the proceedings a comparative lull ensued. While Editor Sauer of the *Herald* was staying in Los Angeles he received, it was reported, a letter from one of his abductors, stating that they would furnish him with the amount that he had invested in San Diego, so that he might be able to get into business any place that he might wish, other than southern California. Mr. Sauer

answered that he had no desire to live anywhere but in San Diego, and there to publish his paper as he had in the past. In the letter also (it was claimed), Mr. Sauer was informed that there would be no more editions of the *Herald.* Nevertheless, the *Herald* continued to appear.

The citizen also declared that Dave Brooks, the first to receive such brutal physical treatment as since then had become commonplace, and on whose case were based the charges filed against Messrs. Wilson and Meyers, had been threatened with death, in the evident hope that he would be frightened out of town and his charges against the police officials quashed.

One Albert B. Prashner, a native of England, and one Thomas Bowling, a native of Canada, were ordered deported on the ground that the emigration authorities considered neither fit to remain in the United States. Both these men had taken prominent parts in the attempt to prevent the passage of the anti-street speaking ordinance. The request for their deportation was another method of the antis, started according to plans outlined previously.

Several members of the I.W.W. were escorted to the county line by the vigilantes, and there asked to choose between transportation northward and a coat of tar. (See Los Angeles *Graphic.*)

Perhaps the surest and most open declaration of these principles occurred, however, in a letter that was published in the San Diego *Union* and *Sun.* It was addressed to the editor of the *Union* and read as follows: "Please print this in your paper. The Constitution of the State of California guarantees the right of free speech and public assembly to all law-abiding citizens who respect the laws of the State and nation, and those whose duty it is to execute them. But it denies that right to all those who have no respect for law or order or for

the officers who are charged with the execution of the laws. [I fail to find such exceptions in the California Constitution.—T. S.]

WHOLESALE KIDNAPPING

"Now, then, as these lawless ones who have denounced the city officers of San Diego, the police and the press of the city in all their meetings, we, the law-abiding [?] citizens of this Commonwealth, think that these law-breakers have gone far enough, and we propose to keep up the deportation of the undesirable citizens as fast as we can catch them, and hereafter they will not only be carried to the county line and dumped there, but we intend to leave our mark on them, and this is what these agitators (all of them) may expect from now on, that the outside world may know they have been in San Diego. The Vigilantes."

This letter so succinctly summarizes the attitude of those to whom freedom of speech means freedom to speak only what they desire others to hear, that it is worth reading again to get all its points. If the Constitution of the State of California denies the right of free speech to all those who would criticize present laws, the lawmakers and the law's execution (which is what the letter means when it speaks of those "who have no respect for law or order"), by what logic can it be inferred that that constitution "guarantees the right of free speech?"

If freedom to speak means freedom to speak within restrictions, then freedom and restriction are synonymous, and we might as well abolish the first of the synonym—which, in fact, is what the vigilantes were attempting to do, and what our courts have sometimes done. And note, too, that they, "the law-abiding citizens," were to do this, not by process of law, but by process of leaving their mark upon the "lawless ones."

Fearing, however, that this publication of the let-

ter might not be sufficient in itself, the San Diego *Sun* proceeded "to make assurance doubly sure" by the following letter to the Sacramento *Star* and other papers:

"Editor *Star:*

"The San Diego *Sun* appeals to you and to all your readers to help San Diego in her present free speech difficulty now apparently nearing a settlement. There has been a great deal of lawbreaking and violence here, and as a result much bitter feeling has been aroused. At present the city is quiet, and a movement for an honorable and peaceful settlement of the question will stand a good chance of success if there is no further disturbance.

"Meanwhile, according to reports, bands of men are on their way to San Diego thinking to support the free speech fight. If they come to the county line, there is certain to be violence. It is very likely that many of the newcomers would be hurt, as a citizens' committee is determined to keep newcomers from joining the dispute. And the trouble at the county line will meanwhile bring more trouble in San Diego. The city, if let alone, will solve the question right—perhaps not to-morrow or the next day, but certainly in the end, for San Diego's people are all right.

"Please print this in a prominent place, and by doing so help San Diego and California to keep order. Let any who may be intending to enter the fight see that they can do no good and will certainly do harm by stirring up trouble."

VIGILANTES' TERRIBLE BRUTALITY TO NEWCOMERS

The sort of trouble that would be stirred up was graphically described by one Ted Fraser, who was one of those that started from Los Angeles on April twenty-second to join the San Diego fight. Stories of jail brutalities, and even those of automobile outrages, paled before those of the victims

of those vigilantes who made it their business to keep people from entering San Diego. When the train on which these outsiders were riding arrived at San Onofre, a number of the vigilantes, all armed, ran up to the flat-car and commanded the intruders to get off. This they at first refused, but were finally forced to do so by the attack of more vigilantes from unexpected quarters who started to club them off the train. As soon as they were off, they were ordered to put up their hands and, while in this position, each man was carefully searched and rid of his change. Remember, this was all for law and order. If any one attempted to lower his hands, a vigilante at his back would keep them at the desired height by cracking the knuckles with clubs. Whenever one of the volunteers was recognized as one who had been in San Diego before, he was called out, covered with a rifle, and kicked, thumped, clubbed and cursed by several others. Fraser claimed that one Joe Marko was pulled out of the line, knocked and beaten until he fell helpless, whereupon he was kicked in the ribs and clubbed all over the body, until, at the end, the vigilantes proceeded to throw what Fraser thought was Marko's corpse carelessly into a pit. Those who watched this brutal treatment instinctively moved forward, but were immediately covered with guns and threatened with shooting. At the end of this treatment, the volunteers who remained were marched into a cattle corral, their hands still in the air, and then marched round the corral in twos. One of the volunteers, Goale, was dragged from the crowd to the tent, where Marko's body lay, and then stripped and beaten. The others, after being kept in the corral for an hour and a half longer with their hands raised, were allowed to put them down and to lie where they were. After a night of extreme misery spent in the open air without a bite to eat or anything to cover them, they had their

pictures taken, and were lectured by one of the vigilantes and warned not to attempt again to reach San Diego. Finally they were taken in small groups to the railway track, ordered to take off their coats, and then forced to run the gantlet of 106 men, 53 on each side of the track, variously armed with pistols, wheel spokes, bull whips and rifles. Even those men who had suffered in the jail and were being brought to this point in the approved automobile fashion were forced to go through the ordeal, of course in the name of law and order, as conceived by the respectable people of San Diego and their sympathizers elsewhere.

SPIRITS UNBROKEN BY INDIGNITIES

Yet in spite of this, Ted Fraser, who described it all in his letter, claimed that they were willing to go again if they could win the fight by so doing. No wonder members of the G.A.R. and Spanish War veterans in San Diego passed resolutions recommending that Congress establish a penal colony on some insular possession of the United States for "anarchists," who so persistently fought and sacrificed themselves for the fundamental democratic right of free speech. No crime is so heinous in the eyes of the "middle class plutocrats" of America as that mere laboring men should insist upon a constitutional right to express their grievances.

Interest and co-operation in the San Diego fight kept growing in various surrounding cities. In addition to the resolutions of moral and financial support passed in Los Angeles and elsewhere, as recorded above, the Building Trades Council of San Francisco instructed its secretary to draft a letter of protest to Governor Johnson against the alleged brutalities of the authorities of San Diego and to call upon him to take immediate steps to insure the right of free speech to every citizen of California.

And the Industrial Council of Kansas City, Mo., went on record, April fourteenth, as protesting against the judicial action against freedom of speech in San Diego. Also, there was some rumor that certain San Diegans had attempted to draw up a free speech ordinance that would be acceptable to all concerned.

The cases of twenty-six free speech fighters were set for May sixteenth.

Editor Sauer returned to San Diego on April fifteenth and addressed a meeting of about 2,000 people in the afternoon. He said that it was doubtful whether he would prosecute at present, although he might do so later.

WIDE PROTEST MAKES GOVERNOR ACT

An entirely new turn was given to events when Governor Johnson finally decided to take notice of the numerous protests he had received. Resolutions expressing sympathy for the free speakers emanated from Oakland, San Francisco, Los Angeles, Bakersfield, Fresno, Sacramento, San Jose, Kansas City and numerous other cities.

Finally, Governor Johnson appointed Harris Weinstock as a special commissioner to investigate what had been going on at San Diego.

"The Governor is desirous of seeing that innocent ones are protected and that wrongdoers are brought to justice, whoever they may be or whatever they may be," Mr. Weinstock declared. He said he intended to conduct an impartial investigation with entirely public hearings. The end of the investigation was to be merely a report to the Governor.

Commissioner Weinstock undertook the work promptly upon his arrival, giving hearings at his rooms, and going to the prisons to investigate conditions. That he intended to proceed fairly was evidenced when Walter P. Moore, the Assistant

City Superintendent of Streets (who instantly was accused of, and did not deny, being one of the vigilantes), said that he could get 1,000 citizens who could testify against the I.W.W., but who did not care to appear at a public hearing. Mr. Weinstock answered that there would be no star chamber.

Mr. Weinstock seemed to be received favorably by both sides, with the exception of District Attorney Utley, who regarded his investigation as an interference in San Diego County affairs that could be adjudicated at home. The District Attorney's office ignored the hearing and refused to aid Mr. Weinstock.

POLICE TRY TO BLOCK INVESTIGATION

It was claimed, moreover, by the San Francisco *Bulletin* that the police were attempting to block Weinstock's investigation. It was said that trains bearing incoming witnesses sent for by the commissioner were met by dozens of police, and that the witnesses were arrested and hauled to the police station in automobiles, where preparations were being made to turn them over to vigilantes, when Weinstock and Judge Sloane were prevailed upon to demand them in the name of the State.

Editor Sauer claimed in his paper that several attempts had been made upon his life since his return to San Diego, and that a second attempt to abduct him was frustrated only by aid of an armed labor committee who refused to allow him to go to and fro alone. It was distinctly stated that he would prosecute his assailants and those of other victims when he considered the time fit for it.

At this time, too, rumor had got abroad that a real anarchist, Emma Goldman, was coming to San Diego to join the fight.

FAIR INVESTIGATION BY GOVERNOR'S COMMISSIONER

On April twenty-first, Commissioner Weinstock brought to a close what seemed to be an investiga-

tion carried on in a thoroughly fairminded manner. Questions were allowed to be asked by any one at the hearing, and in spite of the fact that many considered this an imprudent course and that, doubtless, it sometimes added temporarily to the confusion, the commissioner seemed to be able to manage the hearing well and to get fair results. The San Diego *Herald,* commenting on the investigation, said: "What will be claimed quite probably as the most notable open denunciation of police and public methods in this or any other supposed civilized community, and their satellites, or understudies—the vigilantes'—within a generation, was made to Governor Johnson's representative, Harris Weinstock, during the latter three days of last week. Tales of suffering, police brutality—of slugging, kicking, beating, and 'mugging'—followed one another in regular and horrible sequence, until women wept, men shuddered, and the Governor's representative said that he had never listened to the equal of the relations in all the course of a long and varied career. Men told of illegal methods used in their arrests, detention, deportations and brutal treatment; stories that made the auditors' blood boil and the commissioner himself writhe in his chair. Men, whose sole crime lay in selling the San Francisco *Bulletin* or the San Diego *Herald,* publications that dared to assert the truth, were arrested, their papers taken from them, torn to shreds and they themselves held on 'detention.' "

On April twenty-third Sheriff Jennings started to serve subpoenas for the Grand Jury investigation.

After Commissioner Weinstock left town, the Common Council adopted, on April twenty-fourth, a 5,000-word memorial to Governor Johnson in reference to the recent trouble, putting most stress on the fact that their actions were necessary in opposition to the I.W.W.

THE FUNDAMENTAL ISSUE STATED

But the answer to this was exultantly summed up in an address made by Cloudlesly Johns, in San Francisco, on the evening of April twenty-first. The *Labor Index* of San Mateo reported it as follows: "'If the boys who are fighting for free speech in San Diego lose that fight, it will mean the suppression of free speech along the entire Pacific Coast,' said Cloudlesly Johns, editorial writer of the San Francisco *Evening Post,* in Odd Fellows' Hall last Sunday evening.

"Mr. Johns laid special stress on the fact that efforts have been made to convince people that the trouble in San Diego is a matter that concerns the I.W.W. alone and that anybody who does not subscribe to the I.W.W. belief is not interested in the outcome of the fight. 'This idea,' said the speaker, 'is entirely false. If the powers that be can prevent the I.W.W. from disseminating their ideas on the public streets, they can silence any other radical organization whose views they do not like.

"'It makes no difference whether a man is an I.W.W., a political Socialist, a religious dissenter, or a single taxer, or any form of radical thinker,' said Mr. Johns. 'If he values the right to express his opinions in public the fight that the boys are now making in San Diego is his fight. If the police and vigilantes of San Diego succeed in driving the radicals off the streets of that city, the authorities will try to drive them off the streets of other cities, and San Francisco will be the next battle ground. And if they drive them off the streets the next move will be to drive them out of the halls, and if that happens we shall have to fight for free speech as people are now fighting in Mexico.'

"The speaker said that the statements that the street speakers in San Diego were blocking traffic and that they used vulgar language were mere subterfuges which the capitalist class used.

" 'The right of free speech means the right of any man to publicly condemn anything he may choose to condemn,' said Mr. Johns. *'Any abridgment of that right is an abridgment of the right of free speech!' "*

FREE SPEECH A WORKING CLASS QUESTION

Agreeing with this idea was also the report of the San Diego situation handed in by O. A. Tveitmoe, secretary and treasurer of the State Building Trades Council, and Paul Scharrenberg, secretary-treasurer of the California State Federation of Labor, who were sent to San Diego by the San Francisco Labor Council to investigate at about the same time that Commissioner Weinstock was doing so. Incidentally, these reporters highly complimented Commissioner Weinstock for the fair and impartial manner in which he conducted his investigation. The report of Tveitmoe and Scharrenberg laid stress on the fact that the fight in San Diego was not alone the fight of the I.W.W., but a class struggle in which the people who believed in liberty and freedom were with the I.W.W. The report, which condemned the actions of the San Diego authorities, was indorsed by the Council and it was decided to have 10,000 copies of it printed for circulation. A victory for the free speech fighters came when G. Hawkins, one of the ten members of the I.W.W. held on the charge of breaking jail property, was acquitted. He had been defended by Attorney Moore. And another occurred when Sheriff Wilson of Riverside, acting upon orders received from the authorities at San Diego, on May fourth, released eighteen I.W.W. men out of twenty-seven, who had been kept in jail since March sixth. Casper Bauer, secretary of the Free Speech League in San Diego, had meantime been eloquently stirring up interest in the fight by speaking in various California towns, where he was received with enthusiasm.

Perhaps the noblest example of undaunted determination that appeared in any of the fighters was that of Joe Marko whose brutal treatment at the hands of the vigilantes was reported in the letter by Ted Fraser quoted above. Fraser was mistaken in thinking that Marko had been killed. However, cruelly mangled as he was, he managed, with great suffering, finally to reach Los Angeles. When he got well again, he started once more for San Diego. At San Onofre he was again captured and brutally treated, which treatment included the breaking of his nose with brass knuckles. On the second day of this treatment, a rope was tied around his neck, the other end of it placed in the hands of a man on horseback, and he was dragged for a mile up the country road until he reached the county line, again more dead than alive. In spite of all this, Marko returned to San Diego twice again; once to testify before Commissioner Weinstock, and once to testify in the charge of dynamite stealing, which was brought against the I.W.W. and proved to be a trumped up charge. The last two times he managed to dodge his enemies and return safely to San Francisco. Marko's own story of his abductors was effectively told in the San Francisco *Bulletin* of May 4, 1912.

Following the acquittal of Hawkins on the charge of wrecking the interior of the jail came the compromise verdict, May fourth, against Peter McAvoy, tried for the same offense, and convicted of an attempt to break jail. The remaining eight men held on the same charge of breaking jail were then released.

WANT FEDERAL INVESTIGATION OF I.W.W.

On May fourth, the city authorities of San Diego are reported to have called on the National Government for aid, asking the Department of Justice to send agents and to instruct the United States District Attorney in California to investigate the

situation created in San Diego by the I.W.W. It did not occur to them that the situation might have been created, not by the I.W.W. but by the fact that certain classes were attempting to restrict the speech of other classes. It seems also to have escaped the attention of all concerned that an inquiry should be made as to the violation by San Diego authorities and their sympathizers in lawlessness of several provisions of the Federal Constitution and statutes. While lawless lawmakers are not even questioned there are those who will think that constitutions and governments are not organized to protect poor people while they complain of injustice and that government by the rich can do no wrong.

POLICE START NEW OUTRAGE

A new and violent outbreak arose on May seventh in San Diego. The facts of the case were that two policemen were wounded and one Joe Mickolash, an I.W.W., was killed. One of the policemen was reported to have been hit by Mickolash with an ax and the action was used to intensify excitement against the I.W.W. Citizens were handed rifles and a sort of general martial law prevailed. It was then decided to run all members of the I.W.W. out of town; and the anti-free speech press had it that this was merely the start of an I.W.W. plot at civil war and that many stores of ammunition were found at the I.W.W. headquarters. On the other hand, the San Diego *Herald* published on May ninth the complete ante-mortem statement of Mickolash, an educated Bohemian and a contributor to European magazines and papers. It was to the effect that he was standing in front of the I.W.W. headquarters when the two officers approached him and asked him what he was doing there, adding a vile epithet to the question. One of them fired at him, wounding him in the leg, whereupon Mickolash reached for an ax which lay inside the door-

way as the only weapon with which to defend himself and struck at the man who had fired the shot. After that, according to the dying man, he had no distinct recollection, as he had received four more bullets in his body and shooting became general.

Whatever the real truth of this event—which probably will never be known—it is apparent that more excitement was created over the wounding of the two policemen than prevailed over the wounding of a large number of prisoners, and savage maltreatment of hundreds not under arrest nor guilty.

ANTIS THINK FIGHT ENDED

That last event undoubtedly served to aid the authorities in driving the I.W.W. from the city and thus suppressing the right to free speech. At the same time a band of eighty who were intending to come to San Diego were arrested at Old Town. Whether they received the same treatment as had been accorded their comrades previously, or they were treated humanely as was claimed by the police, is a matter of dispute. But with these arrests and the general round-up that was undertaken in San Diego following the wounding of the policemen—when it was decided to arrest everybody suspected of being an I.W.W. man—the anti-free speech press claimed that the trouble was over; but the San Diego *Herald* questioned whether free speech had gone, and answered enthusiastically in the negative. For the next few days the I.W.W. men were being escorted out of town, and many people thought that the city was finally rid of its trouble—which would really have meant that free speech had been dealt a deathblow in San Diego.

The results of this shooting disturbance were two. On the anti-free speech side, Spreckels, the proprietor of the *Union,* offered to start a relief fund for the officers wounded in their "duty" (of protecting the lawless tyrants) by contributing from

$200 to $500. And a great deal of talk ensued in regard to the "death list" alleged to have been framed by the I.W.W.'s. Two members of that organization were arrested near Escondido for being inmates of the house before which the shooting occurred, and, therefore, being accomplices in it. Besides, the habeas corpus proceedings, which Attorney Moore attempted to introduce to deliver the eighty-four men who had been sent northward from the county line at the time of the round-up, met with an obstacle from Assistant District Attorney McKee, who claimed that his office had not been properly served with the petition.

SAN DIEGO FUNERAL IN LOS ANGELES

On the other hand, the I.W.W.'s prepared to have a funeral demonstration for Mickolash; but, being thwarted in that in San Diego, the body was sent on to Los Angeles, where a large funeral parade was held for him by sympathizers, and where Emma Goldman delivered the funeral oration. One Feyer, who was to act as marshal, was arrested on his arrival in Los Angeles on the charge of having stolen a horse in San Diego. But the funeral demonstration was carried out, nevertheless. It was rumored that the free-speakers who attended this funeral were to proceed to San Diego, there to renew the struggle for liberty of utterance.

An amusing incident of these strenuous times occurred in San Diego, when the authorities became much excited over the report handed in by a physician of having seen an I.W.W. camp in Balboa Park. A round-up was prepared for, but it was later discovered that this typical hobo camp was that of a number of boy scouts.

Los Angeles organized a Free Speech League, to work in conjunction with the national Free Speech League. At the meeting, A. R. Holston disputed the idea that free speech existed now or ever had existed.

EMMA GOLDMAN DRIVEN FROM SAN DIEGO

Now again came another frightful outbreak of brutal suppression. On May fourteenth, Emma Goldman, accompanied by her manager, Dr. Ben Reitman, arrived at San Diego to deliver a speech there. She was met at the station by a large, hostile mob, which surrounded her as she rode on the bus to the Grant Hotel. The vigilantes also visited the hotel and demanded that Miss Goldman and her companion be driven out. Affairs became so turbulent that Miss Goldman decided not to deliver her lecture on the "Drama," as she had intended. The Socialist Hall, which was to have been furnished for her use, was refused to her, probably because the manager had been terrorized by the vigilantes, as Miss Goldman suggested. Then the hall of the Musical Institute was offered to her. But Miss Goldman said that the time was inopportune. She left San Diego late that night.

REITMAN'S TORTURE UNPRINTABLE

But her manager, Reitman, was kidnapped by the vigilantes and subjected to most inhuman treatment. The tale of his sufferings reads, as many papers commented, like the tales of Apache deeds. As he narrated his tale, he was taken by fourteen vigilantes, who looked to him like business men. When, at first, he refused to go with them, they clapped revolvers to his body and placed their hands over his mouth and dragged him to an automobile, while the police—although they denied having anything to do with the affair—cleared the way for his abductors. On their way to the desert, about thirty miles from San Diego, his captors thrust pencils into his nostrils and ears, stuffed filth into his mouth and struck him with their fists and clubs. When they reached the desert there was another party waiting. In the light of the fire they stripped him, and then committed on him acts of such vile, fiendish, gross and barbaric indecency and torture that

he claimed the details of them were unfit for publication. Should the story be published in its very detail, it might even be suppressed in this "free" country because violative of our laws against "obscene" and filthy literature. Screaming from pain, he begged them to kill him and end it. But they refused, stating that they wanted him to go away and tell how they received advocates of free speech in San Diego. Then he was ordered to sing "The Star-Spangled Banner," and at every false note he was struck in the face, being knocked down several times during the ordeal. "I stood naked in a yelling circle of white men who advanced in pairs, their eyes glittering in the light, to inflict pain," Reitman said. "I have read of Indians; even they could not have devised more ingenious means of brutal treatment than these fourteen Americans. They vied to see who could conceive the most diabolical torture. Being of strong physique, I was able to withstand what they did."

Following this he was asked several questions, to which his truthful replies were met by blows in the face. After a half hour or so of this treatment, he was made to run the gantlet, being beaten with "billies" as he ran. Then, while six men held him to the ground, another slowly traced the I.W.W. letters with a lighted cigar on his back. Following this a small American flag was stuck down his throat until he was almost strangled, and desert thorns were stuck into his ears. Then they discussed putting out his eyes, but finally gave that project up. At the end they smeared him with filth and then applied the tar, covering it with cactus and desert grass, and finally drove him into the desert.

When Reitman told his story in Los Angeles, a resolution of protest was got up to be sent to every State Federation of Labor in the country, as well as the locals. And in San Francisco a committee of five, appointed by the Trades Council, recom-

mended that Governor Johnson be urged to bring about a prosecution of the vigilantes, that Congressmen Kent and Berger be asked to secure the federal investigation of the San Diego situation; that the labor press of the country be asked to give all possible publicity in exposing the actions of the San Diego police and vigilantes; that labor organizations arrange a series of mass meetings to raise funds for prosecution; that members of the California Legislature be asked to oppose all State appropriations to the San Diego Exposition, "until the citizens of that city recognize the right of free speech."

As Colonel C. E. S. Wood, of Portland, Ore., said, in the *Journal,* of that city: *"Unless a man can freely speak his thoughts on any subject whatever, there is no free speech.* Our Constitution says a man shall be allowed to freely speak his thoughts, being held responsible for his words, as, for example, if they be libelous or inciting to riot."

STAR-CHAMBER INVESTIGATION

This was the period of the height of ascendency of the crushers of free speech. The federal Grand Jury started to investigate the I.W.W. organization behind closed doors. Even federal grand juries, of course, would not make inquiry if its respectable people had violated several provisions of the United States Constitution—such as the guarantee of due process of law. The county Grand Jury indicted thirty members of the I.W.W. who were inmates of the house before which the shooting of the policemen occurred, charging them all with assault with a deadly weapon with intent to commit murder. After spending 100 days in jail awaiting trial, Lewis Shoup was convicted of violating the street-speaking ordinance, and sentenced to thirty days. Of course, this Grand Jury found no indictment against vigilantes. Their crimes were law and order. And the Citizens' Committee, or

vigilantes, became very active in "advising" the bondsmen for free speech prisoners to leave town; thus intimidating them and forcing many men back to jail. *The climax of suppressing of speech was reached when the order to Editor Sauer to cease publishing the Herald, which had been valiantly stating the truth about the conflict in its columns, was rendered effective by a band of vigilantes who pied the forms of this newspaper.* The *Herald* ceasing publication then, and the *Labor Leader* being also frightened, reports of the Reitman outrage, as far as the San Diego papers went, were confined to expurgated tales in the "anti" press, which treated the affair rather as a good joke.

When Chief Wilson was brought into court on a writ demanding that he produce in court the eighty-four prisoners taken at Old Town, or tell to whom he transferred them, he brought eight into court and reported that four had been transferred to the Emigration Commissioner for deportation to foreign countries, and that the remainder had been released.

REPORT TO GOVERNOR TELLS OF TYRANNY

At about this time Commissioner Weinstock's report to Governor Johnson was made public. Practically a complete copy of it was printed in the San Francisco *Bulletin* of May eighteenth. While it condemned in general the I.W.W. tactics, and recommended that legislation be instituted to cope with them, in vigorous terms it denounced the brutal lawlessness and tyranny of the San Diego authorities and business men. On the whole, it was a scathing denunciation of the outrages committed, although it was apparent that Mr. Weinstock did not believe in the unabridged free speech of our Constitution, and recommended legislation against the doctrines of the Industrial Workers of the World.

"Your commissioner feels," it said, "that the right of free speech should be inviolable and that it should

not be left to the police, in their discretion, to prevent men from exercising this constitutional right on the grounds of anticipating an improper use thereof, no more than the police are warranted in imprisoning a man indefinitely, in anticipation of possible wrongdoing because he had committed some other crime. . . . There is much testimony, however, not only from members of the I.W.W., but from citizens in no way affiliated with the Free Speech League, that would go to show that there had been needless brutality on the part of police officers on the public streets at various times, while meetings in the forbidden districts were being dispersed and speakers were being arrested. . . .

"Mr. Frederick H. Moore, the attorney for the Free Speech League, testified before the commissioner that the attitude of the District Attorney had been at all stages such that it would be practically impossible to obtain his co-operation, in his official capacity, to prosecute persons who, under the guise of a vigilantes committee, had, in the name of law and order, beaten and shamefully abused members of the I.W.W. and others, and deported them beyond the county line. In reference to the District Attorney, H. S. Utley, your commissioner desires to state that he was the only city or county official called upon to co-operate in the conduct of this public inquiry who failed to respond. . . . A great mass of evidence was submitted to your commissioner, including forty-three sworn affidavits, to the effect that *members of the I.W.W., their sympathizers and others, had, within the last thirty days, been arrested by the city police, either on the streets or in the headquarters of the I.W.W., and, without being charged with a violation of the law, had been taken out of the city, either by autos, auto trucks or railroad trains, for a distance of twenty-two miles, and there subjected to an inhuman, brutal beating by a body of men, a part of whom were*

police officers, part constables and part private citizens."

At this point Commissioner Weinstock included in his report special tales of some of the worst cases, winding up with this comment: "*Your commissioner has visited Russia, and while there has heard many horrible tales of high-handed proceedings and outrageous treatment of innocent people at the hands of despotic, tyrannic Russian authorities.*

RUSSIA OR AMERICA? ASKS COMMISSIONER IN REPORT

"Your commissioner is frank to confess that when he became satisfied of the truth of the stories, as related by these unfortunate men, it was hard for him to believe that he still was not sojourning in Russia, conducting his investigations there, instead of in this alleged 'Home of the brave and land of the free.' Surely these American men, who, as the overwhelming evidence shows, in large numbers assaulted with weapons in a most cowardly and brutal manner their helpless and defenseless fellows, were certainly far from 'brave' and their victims far from 'free.' . . . In view of the strained conditions existing at this time in the County of San Diego, and in view of the utter lack of confidence on the part of the victims of the so-called vigilantes' committee in their being able to obtain justice and redress at the hands of District Attorney H. S. Utley of San Diego County—because of his pronounced hostility to them and to their causes of complaint—your commission would suggest that you give due consideration to the advisability of instructing the Attorney General of the State of California to consider such evidence as may be submitted to him by the attorneys of the victims of these outrages, with a view of taking an active part in, or charge, of such criminal proceedings in San Diego County.

UTLEY BITTERLY ASSAILS COMMISSIONER

Naturally, the report of Commissioner Wein-

stock was received with bitter opposition by the San Diego "citizens," and specially District Attorney Utley. Speaking of the commissioner's remark concerning him, made in the report, he said: "The statement that the District Attorney for San Diego County did not do his duty is absolutely and unequivocally false, and I shall hold him personally responsible for his statement. I know my duty, and he evidently doesn't know his. The statement that the right of free speech has been trampled upon is false, and Weinstock could have found that out, if he had taken the trouble to investigate. That statement renders his report useless, because it is barren of fact.

"So far as I am concerned, neither Weinstock nor any other official can say that of me which is untrue and unfounded. He manifested from the first that he was unfamiliar with his duties. I considered his appointment and his mission to this city an insult to the city and county officials, who had attempted to enforce the law under intolerable conditions, which have been rendered worse by threats of assassination, and I disregarded his official status, if he had any. . . .

"To my mind the whole movement was an attempt to create political capital in favor of the Governor of the State. . . . I do not criticize him. . . . But the attempt to secure political influence by means of an alleged investigation, for which there never was any legal or moral justification, is something that should not be sanctioned by the great State of California, and which should be condemned by every citizen of this country."

Thus it was only by broad and virulent denials, based chiefly on mere difference of opinion, that District Attorney Utley was able to reply to Commissioner Weinstock. Just why there was never "any legal or moral justification" for the investigation is a rather interesting question. And whether

"every citizen of this country" would be willing to admit that "the statement that the right of free speech had been trampled upon was false" remains to be seen when the hysteria has subsided, even though generally credited as true at the time.

Commissioner Weinstock, who returned to San Diego the day following this statement, remarked that all he had to say in regard to it was that every word in his report was true, and that he was willing to defend it.

Mr. Weinstock was interested in learning just what had been happening since he left town. Messrs. Moore and Robbins, attorneys for the free speech fighters, and Mr. Rawlins, their secretary, had been warned, they claimed, by the Vigilance Committee to desist in their work and to leave town or to take the consequences. The attorneys petitioned for the citation against John Porter and fifteen other vigilantes for contempt of court in interfering with an officer of the law in discharge of his duties and also for the protection from violence. Saturday being a court half-holiday, Judges Guy and Sloane ruled that no protection could be furnished until the following Monday. The attorneys claimed then that they would take steps to protect themselves. Various rumors were afloat. One was to the effect that Attorney Moore had left town. Another that the attorneys and the secretary had barricaded themselves in their office, awaiting the visitation of the vigilantes. It was even rumored that the vigilantes intended to attend to Commissioner Weinstock.

On May eighteenth the Los Angeles *Social Democrat* printed a story by Hawkins, which made public another variety of the vigilantes' cruelty. It was to the effect that nineteen men were taken out of jail and, surrounded by eight mounted and armed officers, were forced, in their weak condition, to run twenty-two miles, to Sorrento, in four hours, and

that every time any one of them slacked up to catch his breath he was beaten over the head with a quirt by the nearest officer. One boy, indeed was forced to commence his trip without shoes. Of him Hawkins wrote: "His feet are in an awful condition, two bloody, swollen stumps."

VIGILANTES DEFY GOVERNOR

In regard to the citation for contempt of court against John Porter and fifteen other vigilantes, argument was held before Judge Guy on Monday the twentieth. Senator Le Roy A. Wright, arguing for Mr. Porter, urged a delay to the following Saturday, which was vigorously opposed by Attorney Moore. Judge Guy finally set the case for the following Wednesday instead. As regards the other fifteen vigilantes, Judge Guy refused Attorney Moore's request to cite them under John Doe proceedings when Attorney Moore was unable to furnish their names. To show the temper of the vigilantes, Mr. Porter admitted advising the attorneys to desist in their procedure, although he denied threatening them with violence. *He said that the vigilantes would pay no attention to Weinstock or the Governor, and that only armed troops would stop them in their course.*

Meanwhile, in the federal probe of the I.W.W., Joseph Meyers and Detective De La Cour were summoned as witnesses, and claimed that the I.W.W.'s had threatened their lives and had been planning to dynamite the city.

The officials of San Diego agreed on certain statements which were published, amounting to a general denial of Mr. Weinstock's report, and basing their objections to street speaking, in effect, on the grounds that the street speakers proclaimed ideas of which they strongly disapproved.

It was then claimed and published that the vigilantes were planning to come out with their work in the daylight. A demonstration was arranged to

take place Wednesday morning before the Courthouse when Mr. Porter's case was to come up, which demonstration was to take the form of a large assemblage of "citizens," each displaying the American flag. But when Senator Wright pleaded for postponement, at least until the following Saturday, the demonstration was changed to meet Attorney General Webb on his arrival in San Diego on the twenty-second. On the twenty-first the national Free Speech League sent the following message to the Governor of California: "We protest against the inhuman and illegal conduct of the authorities, citizens and business men of San Diego [if they are as reported in the press despatches] and the assaults on Dr. Reitman and many Industrial Workers of the World" and promised assistance in protecting the constitutional freedom of the I.W.W. Similar dispatches were sent to the Mayor and Chief of Police of San Diego, and asking them to free themselves of the suspicion of their complicity in the matter.

ATTORNEY GENERAL SENT TO SAN DIEGO

Governor Johnson had by this time taken action and directed Attorney General Webb to proceed to San Diego and there enforce the law. He said: "From all over the State came to me appeals to investigate the San Diego situation and these were, in most instances, from others than I.W.W.'s." Then he proceeded to speak of his opinion of Commissioner Weinstock, and of his report he said: "Since Mr. Weinstock's return various other matters have been submitted to me, and I am convinced that Mr. Weinstock's report is substantially accurate. Of course, I have no sympathy with the propaganda of the I.W.W.'s. Organized society or government will be impossible if the teachings of that organization be carried into effect; but no organized society or government can suffer for one

instant a denial of the protection of the law by any locality to any man. . . .

"If San Diego wishes the aid of the State in any just cause, most cheerfully will that aid, upon request, be accorded. But just as certainly will the aid be given to any man, however humble and feeble, whose rights are trampled upon in San Diego, and with exactly the same alacrity will the State endeavor to provide redress for those whose liberty has been wantonly violated. . . .

"It appears that the constitutional rights of certain innocent people in the City of San Diego have been infringed, and in pursuance of the power that is mine I shall direct the Attorney General of the State to proceed to San Diego, that the law may be enforced; that justice may be done; that a solution of the problem confronting San Diego may be found, and to give us thereafter the benefit of his knowledge and experience so that other localities and other cities may be protected. I wish him, as the chief law officer of the State, so far as he can, to afford redress to any who have suffered wrong, and to mete out equal and exact justice to all."

In the face of this vindication of Weinstock's report, and the evidently strong expression of determination to guarantee to San Diegans the constitutional rights which had been denied them by the authorities of the city, it is little wonder that the vigilantes looked forward with anxious curiosity to the arrival of Attorney General Webb, and decided to confine their efforts for the present to meeting him at the station with a large display of American flags. It is also not surprising that Casper Bauer, of the Free Speech League, expressed himself hopeful of the outcome.

Meantime, on May twenty-second, the case against Porter opened with Judges Guy, Sloane and Lewis sitting together. Detective Sheppard

was called as a witness, and proved to have a very faulty memory.

Meantime, with the anticipated advent of Attorney General Webb, or, because of his illness, the possible substitution of Deputy Attorney General Benjamin, it was claimed in the press that the vigilantes were to cease their extra-legal action by night and were to form into a large daylight committee to assist the police only on the police's invitation.

As a result of the notice that Attorney General Webb or Benjamin were to come to town, several of the San Diego authorities, including the now well known District Attorney Utley, expressed in the press their approbation and their willingness to help him. But those fighting for free speech objected to either Webb or Benjamin, because they claimed that both were in sympathy with the vigilantes and that the friends of free speech would not get a square deal from them. Lawrence Todd, in the Sacramento *Star,* brought out suggestions of Governor Johnson's indebtedness to both Senator Wright, defender of John Porter, and John D. Spreckels, chief of the anti-free speech newspapers; and showed that there was a possibility that the Governor's gratitude to these might somewhat temper his justice to the enemies of free speech—although the writer hoped that Governor Johnson was a big enough man to withstand such temptation.

It was also rumored that several I.W.W.'s were planning to return to San Diego and testify before the Attorney General when he began his inquiry. And, on the other hand, it was insinuated in some quarters that a large, peaceful demonstration of citizens which was to meet the Attorney General at the station decorated with American flags, was really, as the Philadelphia *North American* suggested, a plan of quiet intimidation. It was also claimed that Editor Sauer had agreed in the future to run

his paper according to the censorship of the vigilantes. Casper Bauer told of an ineffectual attempt to reach an understanding between the two sides to the controversy.

BIG INTERESTS HELP ACQUIT PORTER

Meantime, the case of John Porter was attracting very great attention. Attorney Moore's attempt to show in the examination the existence of a vigilante system was objected to by Senator Wright, and the objection sustained by Judge Lewis. Much evidence was, nevertheless, produced to show that Porter had used intimidating language to Moore. But Porter was finally acquitted of the charge of being in contempt of court because it was stated that in his talk to Moore, Robbins and Rawlins, he had not made specific reference to the cases in court in which they were interested as attorneys. Porter had admitted, indeed, that he had gone to the police station to see Moore and talk to him about slowing down on his agitation, but he insisted that he told him that the talk was not intended as a threat. He said that he had been advised before he acted that he should not interfere with the proceedings of the courts. He declared that he had this in mind when he talked to Moore and was careful to make no reference to the case in court. However, it cannot be doubted that he knew and intended that Moore should understand his court activities in these cases were included, and that the suggestion so harmless in the words actually used, in the mind of Moore would be related to the experiences of Reitman and others, and so deter Moore from doing his duty to his clients. But none are so blind as those judges who wish not to see. Did the judges also see spectres of themselves tarred and feathered? Anyway, Judges Guy and Sloane said the remedy was an action for assault, not for contempt. Porter was defended by a committee of eight lawyers, representing the Spreckels interests

and the Santa Fe Railroad, all appointed by the San Diego Bar Association. For somehow bar associations sometimes happen to see law and order and free speech just as other respectable and wealthy men view these constitutional rights when exercised by radicals.

The cases seemed to show very clearly how a well advised man can skirt the lake of the illegal, wash his hands thoroughly in it, and yet avoid falling in. When the case was ended, and the judges were leaving the court-room—according to the San Diego *Sun* itself—Porter approached Moore and said with a laugh: "You are a good fighter, anyway, Mr. Moore. I am glad that I kept that crowd away from you at the Cecil Hotel that night."

While waiting for Webb to arrive, San Diego kept up the interest in its affairs by an incident in a café. The proprietor, Rudolph Schulte, had for two days been presenting silk flags to his customers. He approached an Englishman with one, but this gentleman made the protest that he was not an American citizen. Several men at the bar demanded that the Englishman drink a toast to the Stars and Stripes, and he is alleged to have replied: "To hell with the American Flag." Thereupon a small riot ensued, in the midst of which the Englishman made his escape.

But this was not enough to keep up the excitement. Chief Wilson stated that he had unearthed an I.W.W. plot to assassinate four of the San Diego officials. And this served to create newspaper material. Moreover, Julius Wagenheim, a baker, is reported as coming out with an open statement that every citizen of San Diego was ready to shoulder a musket in the defense of his home; and that the vigilantes' action was all right in every respect except that they proceeded by night; which error a daylight league was to remedy.

Finally, Attorney General Webb, with his chief

assistant, Benjamin, arrived in town and stated the following: "Governor Johnson is desirous to learn the truth of conditions in San Diego with respect to the I.W.W. and nothing more. Whether or not my investigation will take any form other than merely co-operating with the local authorities it is too soon to state. . . . I apprehend nothing but the most cheerful willing co-operation by the local officials. . . . Politically, I am affiliated with every public official here.

"It is a serious matter for the State to step in and take the law into its own hands. Realizing this, of course, I shall do all I can to co-operate with the local officials. It is the duty of the State to see that the laws are enforced, and I shall do my best to see that this is done. If I should find that the laws cannot be enforced through the local officials, then I should act accordingly. . . . I believe that a municipality has a right to create a centrally congested district and to maintain the same. But any wrong on the part of the I.W.W. doesn't justify the taking of the law into their hands by a vigilance committee. It is my duty to enforce the law, and I certainly will try to do my duty."

HERALD AT LAST BECOMES INNOCUOUS

On May twenty-fourth a mild issue of the San Diego *Herald* appeared, in which, however, the editor denied that any provision had been made for the censorship of the paper. Following this, other developments were that Chief Wilson claimed that attempts had been made on his life, while, on the other hand, Attorney Moore said he would attempt to have Chief Wilson arrested because it was claimed that it was he who took Secretary Rawlins out of town in an automobile.

The Englishman who had precipitated the riot in the café and whose name was found to be J. J. Evans, was later arrested by Chief Wilson. The prisoner claimed that he had no intention of insult-

ing the American flag, that he was drunk at the time; and he was released with a $6 fine.

Meantime, patriotic appeals were persistently made to cloud the issue of free speech. A mass meeting of protest was held in Union Square in New York City, and rumors were circulated beforehand to the effect that the American flag was to be desecrated. But nothing of the sort occurred, as Mr. Alexander Berkman, coworker with Emma Goldman, had prophesied it would not. But more pernicious was the attempt to cultivate intolerance of children in San Diego schools' Memorial Day exercises. Captain S. W. Bell, at one of the schools asked the children: "Do you, as coming American citizens, want persons here who will desecrate our flag?" "'No!' thundered a thousand as with one voice," the San Diego *Union* reported.

Free speech advocates would have suggested to the children that if any one desired to desecrate the flag it was their duty as peace loving citizens to make earnest and honest endeavor to discover why such persons no longer had confidence in the flag as truly symbolizing political righteousness and social justice. Having discovered the cause of distrust or disgust, in so far as injustice was the foundation, the cause of complaint then should be removed, and in other respects the complainant's errors should be exposed.

VIGILANTES THREATEN COMMISSIONER WEINSTOCK

Another very interesting development was Colonel Weinstock's speech about conditions in San Diego, at the San Francisco Commonwealth Club. There he stated that he had received anonymous letters threatening him with the same treatment as that accorded Dr. Reitman, if the opportunity occurred. The letter was signed "One of the Citizens' Committee." Colonel Weinstock further stated that Chief Wilson had admitted to him that he had made up his mind not to grant street speak-

ing permits—necessary to conduct speaking in the streets in San Diego—to the I.W.W. or any of their sympathizers. "This," he said, "was transplanting Russian methods to American soil with a vengeance." Of course, a chief of police whose duty it is to enforce the "law," at least in San Diego, should not be expected even to ask what are the rights of citizens, much less to know that our courts, although never overfriendly to liberty, yet uniformly hold that such lawless discretion or power cannot be vested in any official. Perhaps the chief knew the San Diego brand of court better than he knew the law, and this may have given him his great assurance.

Chief Wilson stated that he believed the anonymous letter to Weinstock had been sent by some of the people who had sent threats through the mail to San Diego officials. Moreover, he created a little more excitement by claiming that he heard bullets whiz by his windows, although the reports of the shots must have been muffled by a Maxim silencer.

Dr. Reitman, it was claimed, would not, because of his anarchistic beliefs, prosecute his tormentors, but stated his intention of returning to San Diego to take up the fight. San Diegans were reported in the press as answering this statement by threats that if he and Emma Goldman attempted to return they would treat them "warmly."

A large protest meeting was planned by the San Francisco Labor Council to take place in Dreamland Rink on June 1, 1912.

Attorney Moore was called before the Grand Jury that was probing the I.W.W.

One Charles Roff, one of those indicted by the San Diego Grand Jury for complicity in the shooting affray in which Mickolash was killed, was taken from Los Angeles to San Diego on June twenty-sixth.

One A. B. Carson attempted, on the twenty-seventh, to make a speech outside the restricted district, and before he was finally arrested, was roughly handled and barely escaped serious violence at the hands of a mob.

Socialist committees and others waited on Attorney General Webb, to welcome him and to present evidence. Casper Bauer said that Mr. Webb was like a sponge, in that he would absorb any evidence given to him and would say nothing in return. It was claimed that Editor Sauer's affair was to be made a test case. Also, Attorneys Moore and Robbins were to attempt to get District Attorney Utley to issue a warrant against Chief Wilson for the abduction of Rawlins, and failing in that, were to present that case, too, before Attorney General Webb.

In the Sacramento *Bee* one statement by Webb was at last given, to the effect that he had told the police authorities of San Diego that if they were unable to handle the I.W.W. situation it would be necessary for the State to take charge and that the only way for the Commonwealth to assume control was through martial law.

An incident in the course of events was the return of the Rev. Lulu Wightman with her daughter to San Diego. Mrs. Wightman had left town after the fire hose outrages; but now, with the presence of the Attorney General, decided to return.

It was also stated that several I.W.W.'s were to return. Sheriff Jennings refused to comply with Chief Wilson's request to keep them out of the city, unless they committed some overt act.

Meanwhile, Attorney General Webb, after two days of social recreation, got down to work. The San Francisco *Bulletin* published an article by George P. West condemning the coming of Webb and stating how useless he would be because of his affiliations with the authorities. Mr. Webb con-

sulted several of the authorities privately and finally made a statement which brought out two points: first, he had delivered an ultimatum to Chief Wilson stating—after the Carson disturbance—that if the police could not control affairs in San Diego, the State militia would have to be called out. "My purpose in this visit was to ascertain the ability of the Police Department to control conditions here without assistance," said Mr. Webb, "to the effect that further violations of law either by residents or non-residents be prevented. I stated to the officials mentioned that past offenses . . . would be attended to in due time and in the proper place; that it was as much the duty of the police to prevent violations of law by members of a committee as by any other person, and as much their duty to arrest such persons for such violations of law, if unable to prevent them."

The method of attending to past offenses was foreshadowed by two points of Mr. Webb's statement, which were recommendations to disband the present County Grand Jury and to call another for the investigation of the San Diego conditions—which recommendations were adopted by the court.

Thus far Mr. Webb had conducted himself in a way as to leave the way open for the future manifestations of any predispositions which he might harbor, and doing little to offend any one.

Incidentally, the attempt of Attorneys Moore and Robbins to get a warrant on the abduction charge against Chief Wilson was refused by District Attorney Utley.

On May thirtieth, Attorney Webb left San Diego for San Francisco for a few days. His assistant, Mr. Benjamin, remained behind. The Attorney General's statement that things were reaching a sane basis in San Diego seemed to be justified. Superintendent Sehon had issued an appeal to the citizens stating that if necessary some of them might

be called upon to aid the police in the performance of their duties, but that all citizens should refrain from initiating any procedure and strictly abstain from violence. Although Sheriff Jennings refused to keep back any I.W.W.'s who might attempt to cross the county line, Chief Wilson said he was prepared to prevent invasion of the city, and was upheld by Attorney General Webb in his claim of right to do this. Poor men have no right to travel. Attorneys Moore and Robbins, while denying authority of the police, urged that no invasion be made at this time, and that attempts at street speaking should be given up so as to allow the present prisoners to come to trial.

Although a half dozen or so prisoners had unwillingly been released on their own recognizance on account of illness, the attempt of Attorneys Moore and Robbins to have some others so released, who had been incarcerated since February ninth, was refused by Judge Guy.

Another setback in the plans occurred when the present Grand Jury did not adjourn sine die on May thirty-first, as was expected and requested, but adjourned until June fifth. They took the stand that the Attorney General's request was a slur on their integrity. The *Union* seemed to uphold them, while the *Labor Leader* claimed that Webb's desire to disband this jury was a sign that proceedings were to be fair. Nevertheless, of course, their action prevented the impaneling of a new Grand Jury on June third, as had been expected.

Another possibility that had been generally discussed was the calling of a special session of the State Legislature to make special laws to deal with the I.W.W. situation in San Diego and all over the State. When Webb was asked about this, he replied that it was a matter entirely under the control of the Governor.

The *Labor Leader,* in its issue of May thirty-first,

expressed its belief that matters were likely to come, under Webb, to a satisfactory conclusion. Webb had been giving audiences to Sauer, and the free speech attorneys, preparing evidence to be placed before the new Grand Jury. "It appears as if the free speech side and its supporters may be given an equal chance with the officials and vigilantes," said the *Labor Leader*.

There was a large Memorial Day parade, "the biggest in the history of San Diego," according to the Los Angeles *Times*, in which "the American flag was conspicuous everywhere." It did not, however, arouse any excitement.

Following this came a lull. It was said that some of the prisoners tried to break jail, and also that an attempt to wreck a train, according to Chief Wilson, was the work of the I.W.W.

The Free Speech Committee at Dreamland Rink, in San Francisco, on June second, aroused tremendous enthusiasm, although it collected only $80 for the cause, according to the *Examiner*.

The City Council of San Diego passed a resolution asking Governor Johnson to call an extra session of the Legislature to deal with the I.W.W. situation and suggested the establishment of a State constabulary for the purpose.

FEDERAL INVESTIGATION OF I.W.W.

Attorney General Wickersham authorized a Federal Grand Jury to inquire into the I.W.W. at San Diego.

After a few days of quiet, and cessation of street speaking, a man who said that his name was L. A. Schriffin and that he represented no organization, tried to speak on a street corner and some 200 people and several policemen gathered. He was so heckled and annoyed by men said to be prominent in vigilant activities, and by motor hooting, that he finally gave up, though Detective Sheppard ostentatiously appeared to protect him from any violence.

Assistant Attorney General Benjamin witnessed the incident [the police conduct of which I.W.W. partisans declared was merely a "frame-up" to discredit reports of violence to speakers] and expressed the opinion that the worst of the San Diego trouble was over and the police would be able thereafter to handle the situation. The I.W.W. program had been outlined as "one martyr per day" to test the right of free speech on the streets and Schriffin was intended to be offered as the first of these. He announced his intention of trying to speak the next day at the same time and place, but did not appear. The day after that, Paul Fickett, a member of the musicians' union, a simple sort of youth, was beaten up and arrested for handing out Socialist pamphlets on the streets.

Mass meetings of protest were held in San Francisco and elsewhere, at one of which Senator Wright, representing the vigilantes, and Harris Weinstock hotly discussed the accuracy of the latter's report on the San Diego situation to the Governor; and at another Mrs. Fremont Older, wife of the managing editor of the *Bulletin,* a paper which had persistently defended the I.W.W. side of the controversy, aroused great enthusiasm.

The police again circulated the report of many improvised weapons found in I.W.W. cells, attempts to break jail, and other disturbances, also a hunger strike, but in regard to this matter the prisoners reported on their release that bread was refused them because of epithets they applied to Police Chief Wilson, and that for days they were given nothing but water.

A. B. Carson, a reporter from Los Angeles, who was maltreated sometime before for an attempt to speak on the street, was released after a hearing before Judge Bryan, because it was shown that he resisted the policeman who attacked him and who appeared against him, only before and not after

formal arrest. His counter complaint against the brutality of this policeman was given no attention.

Word was received June fifth from the Governor that there would be no extra session of the Legislature called, as the San Diego City Council had petitioned as being necessary to deal with the I.W.W. situation. The anti-Johnson press had steadily tried to show that San Diego was merely a sacrificial goat to be burned on the altar of the Governor's political ambitions and intrigues.

The Grand Jury, whose discharge Attorney General Webb had tried to bring about, insisted that its unfinished work would require at least three months longer to complete, but that a portion of this could be postponed so that the I.W.W. cases could be taken up June seventeenth.

It was about this time that Albert Prashner, who had been arrested in February, together with sixteen others, who said they were Socialists, Single Taxers and members of the I.W.W., was sent to the port of New York for deportation. The incident throws interesting light on the lengths to which San Diego went in this fight against free speech. The city authorities charged Prashner, who was a camera maker, with illegal entry into this country. The evidence against him was not only insufficient but vague and technical only. The hearings were conducted in a "star chamber" manner. He was turned over to the Department of Commerce and Labor and ordered deported. Although the opponents of free speech had successfully engineered the deportation of one Thomas Bowling, a writ of habeas corpus was obtained for Prashner by Mr. Henry Zachs, an attorney in the office of Mr. Simon Pollock, Attorney for the Political Refugee's Defence League, who had been retained in the case by the I.W.W. When the case came to court Mr. Pollock after persistent effort persuaded Assistant U.S. District Attorney Walton that there

had been no adequate cause for action and upon Mr. Walton's advice his department canceled the order for deportation June sixth, and Prashner was released.

A man called variously Joe Dominsky, Andrew Arnold and "Dutch," against whom the Grand Jury had found an indictment in connection with the shooting of Patrolman H. C. Stevens, some weeks previous, created considerable excitement in an alleged confession as to his knowledge regarding the plans of the "anarchist" element in San Diego, but no developments followed his statements and they were finally regarded as a device to ingratiate himself with the local authorities.

SMALLPOX EMPTIES CITY JAIL

On June seventh, because smallpox had broken out in the jail, fifteen I.W.W. prisoners were released. "We knew that smallpox breeds in just such filth as was in our tanks," one of them, Charles Pierce, said, "so we agreed together to plead guilty, but we shall not leave the city." Pierce was a young man of more than ordinary intelligence, who had been in the jail for 118 days. Until the day before his arrest he had been employed on street work. "After our arrest," he continued, "we were thrown into the drunk tank, a cell 16x16, where forty-six of us were crowded for seven days without bedding. *Those of us who couldn't find room on the bare cement floor to sleep had to sleep standing with our feet under others lying on the floor.* The sanitary conditions were terrible. At intervals some of us would be taken out and beaten or choked or kicked for no reason whatever. We were threatened with the injection of formaldehyde into the tank, and later some strangling sort of gas was injected. We had no opportunity to bathe and our condition became so filthy that smallpox would have certainly been fatal."

Each of the sixteen released was sentenced to

thirty days in jail and a fine of $100, the sentence then being suspended and the men being placed on parole for four months. This emptied the San Diego city prison, but the county jail was still full of I.W.W.'s.

FIGHT RENEWED

The day after this the free speech campaign was renewed with Mortimer Downing's attempt to speak on a street corner within the once restricted district. He was not disturbed by the police, many of whom were present, but was frequently interrupted by cat calls and motor tooting. Mrs. Laura Payne Emerson started to hold a meeting the next day, assuring a protesting policeman that she was there to read from the Bible which she carried, when Mrs. Geneva Yenrick, of the vigilantes, shook her fist in Mrs. Emerson's face and said, "You are not here to read the Bible; you are here to start a riot," and went on to threaten physical violence. The crowd that gathered was finally dispersed without violence from any source.

The police announced a general round-up of I.W.W.'s, "all vagrants" and those "suspected of conspiring to violate any law." Government secret service men were reported as assisting the local authorities in this. The disposition of the large number of prisoners resulting was, however, found to be a serious problem. Many of them were simply dumped beyond the city limits and warned not to return.

POLICE ARM WITH GUNS

Among the more active of the vigilantes there was talk of starting a movement for separate Statehood for southern California as a result of the continued San Diego troubles. A number of "soap box" meetings were broken up either by the police or by vigilantes, the former declaring to their victims that "the temper of the people will not allow us to permit you to speak" and "overripe" eggs

were plentifully in evidence. Superintendent of Police Sehon declared that his men were going to rid the town of "every undesirable character." The purchase of rifles for their "own use" was reported and practically admitted by Chief of Police Wilson, though he denied that the fact was in any way connected with the I.W.W. troubles. A Federal Grand Jury investigation of the whole San Diego situation was reported as imminent, but lacked authoritative confirmation. Many of the vigilantes were reported, however, as getting "cold feet," and handbills were distributed, reading: "Patriotic Vigilante Rally. . . . One of us is to appear before Judge Guy to answer to charge of contempt. . . . Some of us stand in the shadow of the penitentiary. All of us may be prosecuted for conspiracy. So far the officers of the law are with us. We must keep them there. . . . This meeting is not called for the purpose of intimidating the court." This was issued on the occasion of the trial of J. M. Porter, as reported by the *Free Press,* July fifteenth.

At a meeting of the San Diego Longshoremen's Union, the I.W.W. faction in it were reported as trying to swing the meeting into active and financial sympathy for the local situation, but failed.

Attorney General Webb and Assistant Benjamin were before the Grand Jury for the greater part of June nineteenth, the Sauer kidnapping case being under consideration. The utmost secrecy about the whole proceeding was preserved by every one concerned. The fight in the cases of E. E. Kirk, Casper Bauer, Harry McKee and eleven others indicted by the Grand Jury for criminal conspiracy to violate the street speaking ordinance, began June twentieth. A Socialist meeting outside of the restricted district was broken up by the police in enforcing the move-on ordinance and many were beaten up. On the twenty-fourth the Grand Jury adjourned

until August thirteenth without returning any indictments.

On June thirtieth, Charles Edward Russell and Mrs. Fremont Older addressed a big outdoor mass meeting in San Diego, on free speech, were unmolested and loudly cheered. Mrs. Older was introduced as "one of the few women who are willing to stand up and be counted as being associated with the right side of the present-day struggle."

FREE SPEECH LAWYER ACQUITTED

Local interest was keen in the trial of Attorney E. E. Kirk, charged also with perjury, before the Superior Court. He was attorney for the Free Speech League at the beginning of the free speech fight, and took a prominent part in the trouble. He was arrested for having sworn that he was born in the United States, though being a native of Toronto. John Bullen, who said he was a cousin of Kirk's, claimed that he was forced to come to the city to testify for the prosecution, the second time, much against his will, the Canadian police threatening to run him out of Canada if he did not. Another interesting feature of the trial was the forced admission of Wilson and other State witnesses that the District Attorney's office had spent money freely in getting them there to testify. The witnesses from Canada were also paid large sums of money. On July thirtieth, Kirk was acquitted and announced that he would run on the Socialist ticket for superior judge.

Acting Chief of Police Myers in announcing that each street speaking case would hereafter be treated separately, said: "If the man on the beat thinks the law is being violated we will stop the meeting, but not until then." Walter Moore, of the vigilantes, said, however, that every attempt to speak on the streets would be prevented by the citizens until an election on the matter of street speaking could be held in San Diego.

According to the *Labor Leader* in re the seventeen free speech advocates charged with "assault with a deadly weapon," as well as violating the street blocking ordinance, whose trial began in San Diego July nineteenth, many of the defendants were not even in the city at the time of the shooting at 18th and K streets. Six of these, including E. E. Kirk, lately acquitted of perjury charge, were found guilty of felony, Attorney H. N. McKee, whose knee cap had been broken by Vigilante Walter Moore and who said he would bring for this a suit for full damages; Jack Whyte, H. Kiser, F. W. Hubbard, and Robert Gausden. Their sentences ranged from six months in jail and a fine of $800 for the two first named to suspended sentences on probation for four and the rest were discharged.

EIGHT-MONTHS BRAVE FIGHT LOST

F. H. Moore and Marcus W. Robbins, who had been counsel for the Free Speech League and the I.W.W. during the recent fight, left for Los Angeles August thirteenth, to open an office there. "This means that so far as the courts are concerned, the fight in this city is over," Robbins said. It was reported from Sacramento that in almost every mail the Governor's secretaries are receiving resolutions of protest at the failure of Attorney General Webb to secure the indictment of the San Diego vigilantes. August twentieth Casper Bauer's trial came up in the Police Court. Bauer was his own lawyer, and, after several days of interesting proceedings, finally secured acquittal.

The arrest of six men at El Cajon, on August twenty-second, reported as connected with a dynamite plot to blow up the new "Spreckels" Theater, and other public buildings in San Diego, as well as to do various kinds of damage over the border line in Mexico, caused excitement for a time. An "I.W.W. house" at 15th and G streets was raided,

an alleged confession was secured from one prisoner many theories as to the "capture of Lower California," the "invasion of Mexico" and so on, were rife, but the I.W.W. press regarded the whole thing as a "plant" on the part of the police. Chief of Police Wilson announced, however, that the prisoners were to be turned over to the federal authorities. According to United States District Attorney Robinson, a proclamation issued by Taft on March 14, 1912, enabled him to issue complaints against the "dynamiters," which will bring them under the jurisdiction of Washington, and the United States Government will be asked to proceed against the ringleaders as breeders of sedition against this country. On September tenth the Federal Grand Jury took up this investigation, and on September twenty-first returned indictments against all the prisoners on the charge of carrying arms into a territory friendly to the United States. Bonds to the amount of $2,000 were talked of.

TRUE ESTIMATE OF "LAW AND ORDER"

The excitement in San Diego was now subsiding and the matter left to the courts. In due time some convictions were had and other persons were discharged. Some of those were convicted under an old California statute against a conspiracy to violate the law, which statute was construed to apply to this subsequent municipal ordinance. Some thus convicted were subsequently pardoned. So far as I am informed the savages who, by violence, sought to inspire the I.W.W., the Socialists, Single Taxers and evangelists with new devotion to law and order have not yet been investigated and I suspect that the legal machinery of the State will never be seriously used to bring the real lawbreakers to justice. Maybe it is best that the value of courts should be thus estimated. Maybe this, after all, furnishes us the truest estimate of law and order. Anyway the whole performance does give us a very clear

idea of the value of our courts as protectors of unpopular persons in time of excitement.

One further question remains. Let us make the rather violent assumption that it was the intention of the violent standpatters in San Diego honestly to promote a love for law and order, we may ask if, by any possibility, such methods as they employed could have succeeded? How did they succeed?

A significant item of evidence upon this question is the speech of Jack Whyte, made in open court, upon his conviction of a conspiracy to violate the unconstitutional ordinance against free speaking. This is, perhaps, the most remarkable speech ever made in an American court, and will no doubt be read with amazement, if not admiration, long after the San Diego lawless friends of law and order are forgotten.

PRISONER MAKES REMARKABLE SPEECH

Jack Whyte addressed the court as follows:

"There are only a few words that I care to say, and this court will not mistake them for a legal argument, for I am not acquainted with the phraseology of the bar, nor the language common to the courtroom.

"There are two points which I want to touch upon —the indictment itself and the misstatement of the prosecuting attorney. The indictment reads: 'The people of the State of California against J. W. Whyte and others.' It's a hideous lie. The people of this courtroom know that it is a lie, and I know that it is a lie. If the people of the State are to blame for this persecution, then the people are to blame for the murder of Michael Hoey and the assassination of Joseph Mickolash. They are to blame and responsible for every bruise, every insult and injury inflicted upon the members of the working class and by the vigilantes of this city. The people deny it, and have so emphatically denied it that Gov-

ernor Johnson sent Harris Weinstock down here to make an investigation and clear the reputation of the people of the State of California from the odor that you would attach to it. You cowards throw the blame upon the people, but I know who is to blame and I name them—it is Spreckels and his partners in business, and this court is the lackey and lickspittle of that class, defending the property of that class against the advancing horde of starving American workers.

"The prosecuting attorney, in his plea to the jury, accused me of saying on a public platform at a public meeting: 'To hell with the courts; we know what justice is.' He told a great truth when he lied, for if he had searched the innermost recesses of my mind he could have found that thought, never expressed by me before, but which I express now. 'To hell with your courts, I know what justice is,' for I have sat in your courtroom day after day and have seen members of my class pass before this, the so-called bar of justice. I have seen you, Judge Sloane, and others of your kind, send them to prison because they dared to infringe upon the sacred right of property. You have become blind and deaf to the rights of men to pursue life and happiness, and you have crushed those rights so that the sacred rights of property should be preserved. Then you tell me to respect the law. I don't. I did violate the law, and I will violate every one of your laws and still come before you and say: 'To hell with the courts,' because I believe that my right to live is far more sacred than the sacred right of property that you and your kind so ably defend.

"I don't tell you this with the expectation of getting justice, but to show my contempt for the whole machinery of law and justice as represented by this and every other court. The prosecutor lied, but I will accept it as a truth and say again, so that you, Judge Sloane, may not be mistaken as to my attitude: 'To hell with your courts; I know what justice is.'"

IX

FREE SPEECH AND THE WAR

Republished from *The New Review*

This present European struggle is not only the greatest war the world has ever known, but it is the greatest war of the world's history from the standpoint of principle. It is the first war ever waged which involves the most fundamental of all liberties, free speech.

While seeking to discover in commercial rivalry and the lust for power the hidden motive of this war, we must not forget that in this as in any war there is involved a struggle for human rights. Here, as often, the struggle has been obscured by the other factors, some of them sordid, some idealistic. But that struggle, and the principle involved, can be discerned in the events which precipitated the war.

The diplomatic correspondence between Austria and Servia (see N.Y. *Times,* Sunday, August 9, 1914) reveals it pretty clearly. It shows a conflict involving the question of the freedom of transmission of ideas. It shows moreover, by implication, the means of avoiding such conflicts, in a clear understanding and general agreement among nations as to these fundamental liberties.

The first Austrian note calls attention to anti-Austrian agitation on Servian territory which had resulted in disturbances of the peace along the border and finally resulted, so it was claimed, in the assassination of Archduke Franz Ferdinand on June 28, 1914.

After a detailed recital of these grievances the Austro-Hungarian Government made certain spe-

cific demands, the first of which embodied the principle of all the rest.

This first demand was as follows: "To suppress any publications which incite to hatred and contempt of the Austro-Hungarian monarchy and the general tendency of which is directed against its territorial integrity."

The second demand was for the suppression of certain Servian societies "addicted to propaganda against the Austro-Hungarian monarchy."

The third demand was for the elimination from public instruction of everything "which might serve to foment the propaganda against Austro-Hungary."

The fourth demand was to eliminate from Servian military service "all officers and functionaries guilty of" similar propaganda.

The ninth demand was for an explanation as to certain Servian officials who had expressed hostility to Austro-Hungary.

All the other demands relate only to the means of making the abridgments of free speech effective and to insure punishment of the assassin of the Archduke, and the suppression of disorders along the border.

The Servian Government acceded to the demand for punishment of the assassin in its own tribunals in the due course of law, but refused to allow Austrian officials to participate in the prosecution. It also, substantially, acceded to the other demands. But on the free speech issue there was a disposition to defend or ignore much that has been said and done, and a manifest unwillingness to proceed with an arbitrary suppression of freedom of utterance.

The Servian attitude is timidly stated as follows: "The Royal Government [of Servia] cannot be held responsible for manifestations of a private nature, such as newspaper articles and the peaceful work

of societies—manifestations which occur in almost all countries as a matter of course and which as a general rule escape official control."

However, the Servian Government agreed, upon proof, to eliminate objectionable school propaganda and to suppress societies "which shall [in future] agitate against Austro-Hungary." It promised to eliminate from military service all found guilty of overt acts against Austro-Hungary and to explain all alleged hostile remarks by Servian officials upon the charges being made specific. Only as to the specific issues of free speech the Servian Government denied the suppression demanded by Austro-Hungary, but promised to submit to the next "Skupshtina" (the Servian legislative body) an amendment to the press laws punishing in the severest manner incitements to hate and contempt of the Austro-Hungarian monarchy.

Furthermore, "It [the Servian Government] undertakes at the forthcoming revision of the Constitution to introduce in Article XXII of the Constitution an amendment whereby the above publications may be confiscated which is at present categorically forbidden by the terms of Article XXII of the Constitution," of Servia.

This makes it apparent that Austro-Hungary demanded of Servia the suppression of freedom of utterance although the laws and Constitution of Servia guaranteed that freedom as to the particular agitation in question, and that Servia timidly defended her free speech laws and Constitution, but agreed to submit their amendment to proper tribunals.

The other demands to Austro-Hungary were substantially agreed to. However, owing to Servian reluctance to suppress freedom of utterance for agitators against Austro-Hungary, the latter declared: "Servia's note is filled with the spirit of dishonesty, which clearly lets it be seen that the Servian Gov-

ernment is not seriously determined to put an end to the culpable tolerance it hitherto has extended to intrigues against the Austro-Hungarian monarchy," and that "the concessions actually made by Servia become insignificant . . . while our request that measures be taken against that section of the Servian press hostile to Austro-Hungary has been declined." Then came the declaration of war.

The action of Servia does not mean that its monarch has any adequate understanding of the importance of free speech, or any religious devotion to it. Neither does it mean that the Austrian monarch had any less contempt for free speech than our average citizen, nor that he was any more arbitrary or lawless in his effort to suppress free speech than is the average American court. But it does illustrate the truth that all human activities, consciously or otherwise, involve issues of principle which, if adequately understood and always accorded unquestioned supremacy in curbing our primitive impulses, would help to avert tyranny and war.

By demanding the suppression of free speech the *one* belligerent hoped to achieve his concealed and unworthy ends; by upholding it, the *other* sought to maintain his contrary purposes. Independent of these ends no war over free speech would ever have occurred. Assuming that the unavowed ends were equally unjustifiable, Austria in addition to the improper ends insisted upon the use of unjustifiable means, in its demand for a violation of the fundamental principle of free speech.

There is only one important war on this earth, and that is the intellectual warfare against that ignorance which is the source of all other wars. The ignorant cannot be reconstructed by enlightment until they are fully understood both as a cause and an effect. They cannot be thus adequately understood unless even the most ignorant ones are absolutely free in the expression of their blindest and

most passionate complaint. Only thus can we ever know the psychology of ignorance well enough to understand all the contributing factors, and only through such understanding do we acquire a maximum of efficiency in our effort to transform ourselves and the other ignorant ones into self-conscious and socially conscious human beings achieving an automatic, peaceful and equitable adjustment to the realities of life. When both the tyrants and their victims have acquired a complete understanding of each other, slavery and war will cease. Except as it enlarges the understanding of those not concerned, violence directed against exploitation and evil does little more than to change its form. Unlimited intellectual freedom will some day destroy its substance.

APPENDIX

INDUSTRIAL UNREST AND FREE SPEECH.

(From the Final Report of the United States Commission on Industrial Relations, page 150.)

One of the *greatest sources* of social unrest and bitterness has been the attitude of the police toward public speaking. On numerous occasions in every part of the country, the police of cities and towns have either arbitrarily or under the cloak of a traffic ordinance, interfered with, or prohibited public speaking, both in the open and in halls, by persons connected with organizations of which the police or those from whom they received their orders did not approve. In *many instances* such interference has been carried out with a degree of *brutality which would be incredible* if it were not vouched for by reliable witnesses. Bloody riots frequently have accompanied such interference and large numbers of persons have been arrested for acts of which they were innocent, or which were committed under the extreme provocation of brutal treatment of police or private citizens.

In some cases this suppression of free speech seems to have been the result of *sheer brutality and wanton mischief*, but in the majority of cases it undoubtedly is the result of a belief by the police, or their superiors, that they were "supporting and defending the Government" by such an invasion of personal rights. There could be no greater error. Such action strikes at the very foundations of Government. It is axiomatic that *a Government*

which can be maintained only by the suppression of criticism should not be maintained. Furthermore, it is the lesson of history that attempts to suppress ideas results only in their more rapid propagation.

Not only should every barrier to the freedom of speech be removed, as long as it is kept within the bounds of decency and as long as the penalties for libel can be invoked, but every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions. The experience of Police Commissioner Woods of New York City, as contained in his testimony before this Commission, is convincing evidence of the good results which follow such a policy. Mr. Woods testified that when he became Commissioner of Police, he found in force a policy of rigid suppression of radical street meetings, with the result that riots were frequent and bitter hatred of the police was widespread. He adopted a policy of not only permitting public meetings at all places where traffic and the public convenience would not be interfered with, but *instructing the police to protect speakers* from molestation; as a result the rioting entirely ceased, the street meetings became more orderly and the speakers were more restrained in their utterances.

JUDICIAL DECISIONS CITED.

TREATISES CITED.

INDEX

Abbreviations; M, Mentioned, Q, Quoted or Quotation.

ERRATUM.

For Edward IV, page 98, read Edward III.